KDUiRC
INTERNATIONAL RESEARCH CONFERENCE

14TH INTERNATIONAL RESEARCH CONFERENCE

" Security, Stability and National Development in the New Normal "

09TH - 10TH SEPTEMBER 2021

LAW

PROCEEDINGS

GENERAL SIR JOHN KOTELAWALA DEFENCE UNIVERSITY

14TH INTERNATIONAL RESEARCH CONFERENCE

SECURITY, STABILITY AND NATIONAL DEVELOPMENT IN THE NEW NORMAL

Law

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General Sir John Kotelawala Defence University

Ratmalana, Sri Lanka

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Major General Milinda Peiris RWP RSP USP ndc psc

Vice Chancellor, General Sir John Kotelawala Defence University

Mr. Lalith Weeratunga Principal Advisor to His Excellency the President Gotabaya Rajapksa, Secretary to Ministry of Defence, General Kamal Gunaratne, Deputy Vice Chancellor - Administration and Defense Brigadier Wipula Chandrasiri, Deputy Vice Chancellor - Academics Prof KAS Dhammika, All Deans and Directors, distinguished guests who are joining us virtually from Sri Lanka and beyond, I warmly welcome you all to the 14th International Research Conference of the KDU.

This year despite the challenges posed by the third wave of the covid 19 outbreak in Sri Lanka, we remain defiant and stand strong with our belief and deep commitment of continuing with the core functions of the University. The International Research Conference taking place for the 14th consecutive time, and it is the most challenging of all times. The KDU was able to slowly but steadily accept the prevailing danger and allow ourselves to assess the situation realistically and see the best options for the best interest of our university. Therefore, this year's conference will be a hybrid one with a major virtual orientation.

I would like in retrospect to trace the evolution of the annual international research conference. The first KDU international conference started in the year 2008, and that was a single-day conference due to limited participation. However, with time the event has grown with international recognition, and every year we were able to add value to this glamorous event in the KDU calendar.

This year's conference attracted over six hundred paper submissions nationally and internationally and this number alone indicates the growing local and global interest in research efforts taking place at the KDU. This year is a significant year for KDU since it marks its 40th anniversary. For the past four decades KDU has contributed selflessly to the nation. There are one hundred and nine (109) Brave Officers produced by KDU for the tri-forces and they have sacrificed their lives to safeguard the territorial integrity and sovereignty of Sri Lanka.

Moreover, KDU has evolved as a unique University at the forefront of productive education. As Nelson Mandela said, "Education is the most powerful weapon which you can use to change the world". In this context, KDU conceptualizes the security aspect of all facets of education by accommodating both civilian and military students to complete their higher education. The harmonious environment of KDU, which consists of a perfect blend of civil and military students experiencing avenues of education together is a great hallmark of inculcating civil military relations. It is a university that maintains a high degree of cosmopolitanism. KDU provides exceptional educational opportunities to students coming from all over the world. Sri Lanka as a multi-cultural society has always realized the importance of promoting harmony. Especially universities should always consist of a splendid blend of cultural identities where individuals belonging to different ethnic and social backgrounds actively interact and engage while learning from each other.

A university's role in shaping the future of the country is crucial. We have succeeded in setting new trends in the Sri Lankan education

system and our futuristic approach has been embraced by the new generations of Sri Lanka. KDU has, without doubt, excelled at that in providing highly competent and self-disciplined individuals to enhance Sri Lanka's potential and they have excelled in their respective fields.

At this significant juncture, I can proudly say that the KDU has added value and meaning to the lives of every cadet and student that we undertook to groom. Our students will contribute positively to the motherland in the same manner. Those who have experienced the KDU are delivering the tasks assigned to them steadily and responsibly. As a university, it has undoubtedly excelled in producing young skilled individuals who have the promise and potential to contribute to the peaceful development of our nation. The KDU will steadily march forward, see the good and bring out the best in her students who are passionate to serve the motherland forever.

This year's theme 'security, stability and National development in the new normal," highlights the importance of stability created by the development and security nexus in the context of emerging new threats to national, human, and global security. This theme expects researchers to link the theories and practices aforesaid different areas. For example, it is vital to understand the context within which multilateral and regional organizations; state, NGOs, and Private Sector are working in a new challenging environment such as the one that we are facing today.

Further, we must understand the nature of the relationship between the actors involved and the context dynamism of all Micro-Meso-Macro levels. The inviolable social contract between the citizen and the state is based on security. In modern-day society, the outlook of security is changing rapidly Therefore, states face unpredictable security threats. The organizers of the KDU international research conference intend to set the tone to initiate more collaborative research to face these new global challenges. As I always point out these types of research conferences are ideal platforms to make connections. I hope that authors of KDU and various other local and international universities will take the opportunity to interact and develop friendly relationships, establish networks, and explore the opportunities to embark on research collaborations.

I wish all the very best for the presenters and hope you will enjoy every moment of this academic fusion.
Thank You!

Keynote Address

Mr Lalith Weeratunga

Principal Advisor to His Excellency the President of Sri Lanka

Secretary, Ministry of Defence, Chief of Defence Staff and Commander of the Army, Commander of the Air Force, Vice Chancellor of the KDU, Distinguished academics, Honoured guests, Friends, Ayubowan.

Once again, I am delighted to be with you this morning at this research conference. It gives me much pleasure to be at the KDU because it is one of the best universities we have in Sri Lanka. Since of late, there have been much attack on and criticism of the KDU. That's because the KDU is doing well and has brooked no nonsense. With a village background, my mind goes back to a famous Sinhala saying, which means "only those mango trees that have sweet fruits are attacked."

The entire world is undergoing a massive reorganization with the COVID-19 pandemic, and the traditional themes and arguments in security seems rather irrelevant in the present context. "Security, Stability, National Development in the New Normal" is a timely theme, giving us much food for thought in terms of the advancement of a country like Sri Lanka. If you take the first component, security, the bottom line of security is survival. *Survival,* is based on a number of factors. Barry Buzan, the veteran in international security rejected the practice of restricting security to just one sector and defined it as "a particular type of politics applicable to a wide range of issues."

As eminent representatives of the security sector, you are aware that the concept of security can somewhat vary from one country to another. When Mexico's major national security threat has remained to be organized crime for quite some time, Afghanistan's has been religious extremism. For a country like Somalia, it is the inbuilt corruption into their governance. For some countries, it might change abruptly. A few days ago, we all saw corruption and mismanagement which was the major security threat of the African nation Guinea, getting substituted by another - an armed unrest. In spite of these differences, almost all countries in the world have developed a commonality during the past year, where the health insecurity assumed a major role over and above all others.

The COVID-19 pandemic has caused the entire world to assume a 'new normal' to fight this common insecurity that is caused by a tiny, microscopic virus. Even during the new normal, however, certain fundamental features of the modern-day security have not changed. Security in the 21st Century was, to a great extent, focused on internal factors of a country, rather than external ones. The organization of the threat factor has changed from state militaries to terrorist organizations to even pirates. The underlying motivation for creating insecurities has shifted from being political to one that is economic.

Targets have shifted from soldiers to civilians. The distinction between 'high profiles' of national security and 'low profiles' of economic and social interactions have softened. This has given rise to new sources of global insecurity in the 21st Century which are essentially 'soft' in nature.

The 21st Century has continued to witness these new sources throughout its first two decades. Donald Rumsfeld, the onetime Defence Secretary of the United States said at a key decision-making point in the history of his country, "there are known knowns; the things we know we know, we also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know." Although stated in relation to a completely different scenario, when recalling this statement, I see that it resonates with the pandemic that we are facing now. In 'security

terms', COVID-19 is a 'wild card', an 'unknown unknown'. It is a security threat without a passport. It caused the 'health security' to assume the prime position in the security landscape of the modern day, surpassing the food security, water security and all other soft securities.

When we view the modern-day threats, we see that none of these is of a purely military nature, as those perhaps were, during the cold-war period. As a result, they also cannot be tackled by purely military means. There is another factor that contributes to the restriction of military means as a response to insecurities. In today's security landscape, States do not have the monopoly that they used to enjoy. Human beings have assumed that role. When the individual is considered as the central point in security rather than the 'State' as before, it gives a new insight into all our security related concerns. This helps us to understand the present-day global vulnerabilities with a new eye.

When the centre of focus in security becomes the individual, it changes the state-centric understanding of national, regional as well as global security. When a pandemic, which cannot be controlled by military means is plaguing the world, the human-centric understanding of security becomes vital to address it in order to ensure development of any country. This is why the 'soft component' of security, or the 'human security' gains more prominence over the 'hard component' of security during this new normal, created by the worst health pandemic in the recent history of the world.

The pandemic has given rise to a number of human security threats. To mention a few, the threat to economic security through unemployment, to health security through the deadly infectious virus and to environmental security through the mass accumulation of the waste generated in the health sector. It has also given a signal on food security as well, which is precisely when the Government declared essential services and appointed an authority to manage the situation in Sri Lanka. So you see, security in the new normal is connected with the stability of a country, but in a different way from how it did with conventional security under the normal conditions.

National development, as we all know, is an all-encompassing term. It includes both the individual and the nation. Therefore, national development can be considered as the process of development and reconstruction of all dimensions of the nation, along with the development of the individual. This concept is essentially linked with both the growth and the change where *change* can be socio-cultural or economic, tangible or intangible. National development involves activities through a planned national economy, application of modern technology in agriculture to enhance production, application of science and technology in the production sector, improving the human resource and providing education for all among many others.

During a disaster such as the COVID pandemic, it also includes providing facilities and assistance to the poorest segments of the society. In theory, addressing the security needs, especially those of soft security and implementing broad array of the previously mentioned key activities in national development ensures the stability of the country during the new normal. This theory is in practice in Sri Lanka today, in different sectors to different degrees.

Let us consider the vaccination drive for example. Two months ago, Sri Lanka was struggling with the inadequate human resource in the civilian component of the health sector to conduct the vaccination programme at its full length. Health sector employees were getting exhausted with the enhancing demand for services. At this point, the Government employed its military health professionals to assist their civilian component. That accelerated our vaccination drive to such an extent that Sri Lanka became the first country in the world to have the fastest vaccination drive to its population.

H.E the President had first-hand supervision of this process, at times acting as a 'vaccination planner', which contributed to the success of the

whole programme. This measure addresses our health security, and at the same time contributes to our national development by making the workforce resistant to the pandemic. Together, the two outcomes contribute to enhancing the stability of the country during this new normal.

Now let us consider a few of the numerous initiatives that the Government has introduced to ensure food security. The Government recently decided to take a transition from inorganic agriculture to organic agriculture, in keeping with pledge given to our people by the President, H.E Gotabaya Rajapaksa, in his policy document, 'Vistas of Prosperity and Splendour." The primary aim was to safeguard the public, and especially the future generations from non-communicable diseases including renal diseases, again ensuring the health security. This also gave an added advantage where the imports of chemical fertilizers became minimal and that saved a considerable amount of money to our Treasury. This also resulted in enhancing organic and bio fertilizer production within the country, opening up new employment opportunities.

Linked with these two activities, the Government also launched 'Wari Saubhagya', a programme to rehabilitate 1000 small tanks across the country. This was to provide water for both irrigation and drinking purposes. These projects ensured irrigation water to a greater area of paddy and other field crop cultivations and also created additional employment opportunities within the country. Overall, those made a noteworthy contribution to the national development as well as to the soft security of the country during the new normal.

National development not only involves the infrastructure development, but also the human development. A developed human resource is a shield against certain soft threats. The programme 'connect Sri Lanka' was launched during the new normal, initially providing four remote areas with 4G connectivity. We are planning to expand it into all 9 provinces.

The pandemic period where schools had to be closed was also used to plan education reforms aiming at producing future generations that are better equipped with battling their way through the ever-changing global order. These enhance opportunities for the public, especially the children to gain access to knowledge that is amply available to children and citizens of many developed countries, and also to equip themselves better to assist with development initiatives of the Government.

Fruits of this labour will be reaped only in the future, where our country will continue to have a learned, open minded younger generations, and through them, smarter work forces. The activities that the Government has started today contribute to national development in the future on the one hand, security on the other, and to stability of the country, overall.

The last example that I wish to draw has a direct connection with all institutions in the public as well as the private sector, electricity. The Government spent over US$ 2.3 Bln for oil imports in 2020. We all know that a considerable amount of this is spent for generating electricity. This is an unbearable amount for a developing country like Sri Lanka, to be spent notwithstanding the prevailing health pandemic. It is also a waste of funds considering the vast and untapped potential that Sri Lanka has for renewable energy.

The Government gave due consideration to both these when establishing 'Thambapawani' the first wind power station owned by the Government of Sri Lanka. Another similar plant has been launched in Pooneryn. Use of solar power has been introduced to households. A waste-to-power plant was also declared open at Kerawalapitiya. It is not an easy task for a developing country like Sri Lanka to manage this shift while battling with a pandemic, but amidst all, the Government plans to increase the renewable energy component to 70% of the total consumption of the country by 2030. It Is an ambitious target, but it helps the country to reach a higher status in self-sufficiency and also prepares the country to face worse calamities than the present one that might arise in the future. The 'failure to prepare' as the old saying

goes, is 'preparation for failure'. We intend to avoid it.

Moving back to the concept of security with these examples, with special emphasis on human security, it is evident that the national development and security are inter-linked. These cannot be achieved separately. This is probably what caused the formerly known definition of security, 'freedom from fear', to be redefined as 'freedom from want', indicating the link between security and development. Human security, as we all know, is an integral part of State security, which in turn, has an equally strong connection with national development. This is why if you have a closer look at Sustainable Development Goals, you will see that all 17 goals are connected to human security.

In this context, I believe there is something vital that we all need to understand about security, development and the stability that those bring about. The new normal caused by the COVID-19 pandemic is calling us to re-think our actions, plans and concepts on security and development both.

Is it not high time for us to re-think our national security and national development?

Is this not the best time for us to redefine our development-security nexus?

Let me conclude by bringing back to your memory, extracts from a famous speech delivered by Robert F. Kennedy during his run for the Democratic nomination for the Presidency of the United States. Over 50 years later, his remarks about the measurements of development resonate with something that we need to re-discover with experience we had during this new normal. He said, and I quote,

"… the gross national product does not allow for the health of our children, the quality of their education or the joy of their play. It does not include the beauty of our poetry or the strength of our marriages, the intelligence of our public debate or the integrity of our public officials. It measures neither our wit nor our courage, neither our wisdom nor our learning, neither our compassion nor our devotion to our country, it measures everything in short, except that which makes life worthwhile."

Distinguished scholars, ladies and gentlemen, let us try to fathom the lesson that this global pandemic and the new normal is trying to teach us. Let us acknowledge the all-encompassing nature of national development and pay attention to the vital fact that has evaded our comprehension thus far – the fact that the individual, the human has assumed the central focus in security as well as in national development. Let us use that understanding to re-define our development-security nexus and bring a lasting stability to our country during the new normal.

Stay safe and take care of yourselves.

Thank you.

Address by Secretary, Ministry of Defence, Sri Lanka

General Kamal Gunaratne (Retd) WWV RWP RSP USP ndc psc MPhil

Secretary, Ministry of Defence, Sri Lanka

Chief Guest and Keynote Speaker of the 14th International Research Conference of KDU, Principal Advisor to the President Mr. Lalith Weerathunga, Ambassadors and High Commissioners, Foreign Secretary Professor Jayanath Kolombage, Chancellor of KDU General Jerry De Silva (Retd), Chief of Defence Staff and Commander of Army General Shavendra Silva, Commander of the Navy Vice Admiral Nishantha Ulugetenne, Chairman of University Grants Commison Professor Sampath Amarathunga, Vice Chancellors of other Universities, Vice Chancellor of KDU, Chief of Staff of Air Force, Director General at Institute of National Security Studies Professor Rohan Gunarathna, Deputy Vice chancellors, All Deans and Directors, former Chancellors and Commanders at KDU, Eminent Scholars, Senior Officers of the Armed forces and Police, distinguished guests joining us virtually from Sri Lanka and Overseas, Ladies and Gentlemen;

I consider it as a great pleasure and a privilege to be present here today at the inauguration ceremony of General Sir John Kotelawala Defense University's International Research Conference which is taking place for the 14th consecutive year and I would like to thank the Vice Chancellor and the conference organizers for the invitation extended for me to be present here to participate in this event. The International Research Conference of KDU is providing the opportunity for academics, professional researchers and practitioners to share their research findings and expertise addressing the mutual challenges in their fields. Therefore, this event has gained tremendous recognition among all interested parties around the world. Further, the provision of a wider interaction and networking with national and international scholars in respective fields would be absolutely beneficial for all the participants to broaden their horizons of knowledge through intellectual discussions. However, due to the global pandemic situation in effect, most participants may join the event through a virtual platform for this conference as same as the last year. Yet, I'm sure we will be able to achieve the desired objectives in a state amidst this pandemic situation.

Furthermore, I'm extremely pleased that the theme selected by the KDU for the conference this year security, stability, and the national development in the new normal is a timely theme capable of augmenting the significance and focus of the subject of strategic national importance. Further, I firmly believe that the endeavor towards warranting the national development and ensuring national security becomes further from achievement by undermining the routine activities due to the ill effects of the pandemic but becomes attainable by ensuring the adaptability to the new normal as widely accepted by all the countries in the world, today which is implied by the theme that you have selected. In fact, as comprehensively illustrated by the keynote speaker Mr. Lalith Weerathunga it is quite imperative that all of us understand and pursue the ways and means of adopting the circumstances embedded with the new normal. in order to coexist with the Covid 19 pandemic which has not shown any expiry date as of yet.

Ladies and Gentlemen in a context of globalization and further economic integration, in recent decades the relationship between national development and national security of a country has become increasingly

interlinked for Sri Lanka. These connections represent both opportunities and potential threats to the country's national security. The open and interconnected Sri Lankan economy creates vulnerabilities from potential international and external threats. Against this backdrop, national development has emerged as an important strategic priority for the Sri Lankan government with the connection between development and national security which will be orchestrated upon the vistas of prosperity and splendor, the national policy framework of our government headed by his excellency the president Gotabhaya Rajapaksha.

Ladies and gentlemen the development generally depend on the stability of a country which should be achieved by ensuring national security. Sri Lanka being a country endangered by ruthless terrorism for almost three decades has experienced a lot of hardships during the past and was in the stage of eyeing its development in the last decade. Even though we were able to relieve the country from the menace of terrorism we have found another security threat in the form of a pandemic which has posed a greater threat to the entire world. The threat that we face today is progressing in its second continuous year without any indication of a possible termination we are yet to find a permanent solution for the same. However, we must always work towards reaching our development goals without letting our country at peril. In such a context our endeavor here as Sri Lankans should be to seek possibilities to find ways and means to steer the country towards development goals amidst said difficulties. Sri Lankan government is at the threshold of trying all possible methods to meet its economic growth and objectives yet with lots of empidements while ensuring human security. When the domestic affairs of a country are affected it is extremely difficult for a country to reach its desired end state. Sri Lanka is no exception in this, regard being a developing country Sri Lanka cannot accept any economic standstills for a protacted time frame. However, any plans to expedite the economic gains should never be at the expense of human lives. Therefore, his excellency the president himself has expressed his keenness on this aspect to see and inspire all possibilities available to ensure the maintenance of momentum in the economic sphere.

On the contrary, we should also note the other contemporary security concerns such as violent extremism, terrorism, piracy, drug, and human trafficking, smuggling, cybercrimes, and other organized crimes and natural disasters pose a grave threat to the stability of a country. Sri Lanka's geostrategic location is susceptible to such threats as it is located in the main sea routes in the Indian ocean. The same geopolitical significance has given a greater recoginition to the country, thus has gained greater demand from the rest of the world. In such instance the possibility of Sri Lanka becoming susceptible to threats posed from violent extremism and organized crimes is very high and present the government has initiated several steps to curtail such illegal activities and such measures taken such as the demarcation of maximum security prisons concept and highly effective maritime domination programs launched by the Sri Lankan Navy which have become very effective in restricting such threats. However, the effects of such activities poses a moderate level threat to the stability of our country.

Ladies and gentlemen a government alone cannot afford to force all these threats that are in concert ruining the stability of a country. Therefore, as responsible citizens, it is our bounded duty to provide novel ideas, suggestions, and proposals to consider in regaining our country's stability and development. I hope the academic events of this nature will undoubtedly serve this national requirement. Such efforts are

arranged to address emerging challenges. Promoting more research and development becomes a task of topmost priority for all of us.

Fortunately, as the Secretary of Defense, I feel tremendously proud and content to say that the Kotelawala Defence University is at the forefront of researching the development of security-related problems in the new normal. The approach adopted by the Kotelawala Defense University to understand the contempaty complex situations concerning the bigger picture rather than dwelling on the narrow passages will become far more effective in resolving the emerging complexity of future challenges. Therefore, I'm well certain that the faculties of General Sir John Kotelawela Defence University with their interest, commitment, dedication, and knowledge in diverse academic disciplines and outside rich researches inputs would contribute immensely to this year's conference theme. The knowledge that you are going to unearth and share during this conference would be of immense benefit not only to the academic community but to the entire humankind to make their lives better.

In conclusion ladies and gentlemen, I should express my most sincere appreciation to the Vice Chancellor and the organizers of the General Sir John Kotelawala Defense University's 14th International Research Conference 2021 for organizing this timely important event amidst the covid 19 pandemic concerns and I wish this event be successful in all way imaginable. Ladies and Gentlemen thank you very much for your patience, thank you.

Vote of Thanks

Dr Harinda Vidanage

Conference Chair, 14th International Research Conference, General Sir John Kotelawala Defence University

Mr Lalith Weeratuna, Principal Advisor to HE President of Sri Lanka, Secretary to the Ministry of Defence, General Kamal Gunaratne, Vice Chancellor – Maj Gen Milind Peiris, Deputy Vice Chancellor (Defence & Administration), Deputy Vice Chancellor (Academics), Rector – Southern Campus, Senior Professors, Deans and Directors, Senior officers representing Tri Forces and Police, Distinguished guests, colleagues, Ladies & Gentlemen, Good morning!

In its 40th Anniversary since its inception the flagship academic conference of the KDU, the international research conference progresses to 14 years of continuity. I stand here to reflect and provide my gratitude to a team of individuals who despite every challenge in the form of material and the forces of nature has confronted us with, have managed to successfully bring us to where we are today.

Since 2019, the country has witnessed unprecedented upheavals from violent extremism to microbial threats that has forced a drastic rethinking of every aspect of social life. These challenges have made all of us believe in a reality that long established norms, traditions, beliefs do have their limits and if we are to survive and thrive in the new normal, we must adapt, adopt and innovate. The core fundamentals driving this year's IRC is based on this conviction and that the KDU as a leading force of defiance and a beacon of hope amidst such calamities.

On behalf of KDU, I would first and foremost like to extend a heartfelt appreciation to our Chief Guest and Keynote Speaker, Mr Lalith Weeratunga the Principal advisor to H E President Gotabaya Rajapaksa. Your presence today is a blessing to us as an institution and to the IRC as a process and your observations made at the keynote enriched us with knowledge and perspective. Your wise words of wisdom will have a bearing on the deliberations of all academic communities within and well beyond this conference. I also would like to thank Secretary to the Ministry of Defence, General Kamal Gunaratne for his presence, his insights and his towering leadership that has seen KDU through fair weather and through some rough storms.

I would like to highlight and appreciate the visionary leadership of the Vice Chancellor, Maj Gen Milinda Peiris and his belief in maintaining continuity of this apex academic event of the KDU. I must then appreciate the critical roles played by Deputy Vice Chancellor (Defence & Administration) Brigadier Wipula Chandrasiri in ensuring that the IRC will take place and providing the administrative leadership towards the materializing of the conference. The support and blessing of the Deputy Vice Chancellor (Academic) Professor KAS Dhammika is highly appreciated, along with the support of all Deans of faculties who came together to make this event a success.

Even at a time when every institution is careful about its purse, our sponsors have stood by us, let me profoundly thank and appreciate the generosity of our Gold Sponsors Bank of Ceylon and the Peoples Bank and with Huawei Sri Lanka and National lotteries board being our silver partners. There are many more who has chipped in and does not want their names mentioned and a big thank you for all.

I must mention that this year it is the first time the faculty of Defense and Strategic studies have been tasked with the overall IRC and holds the chair. I must with gratitude mention the hard work of my colleagues in both departments of Defense and Strategic studies under the leadership of Col Enoj Herarth the dean of the faculty. The FDSS represents the tip of the Spear of the KDU and bears

testament to the perfect convergence of civic-military relations.

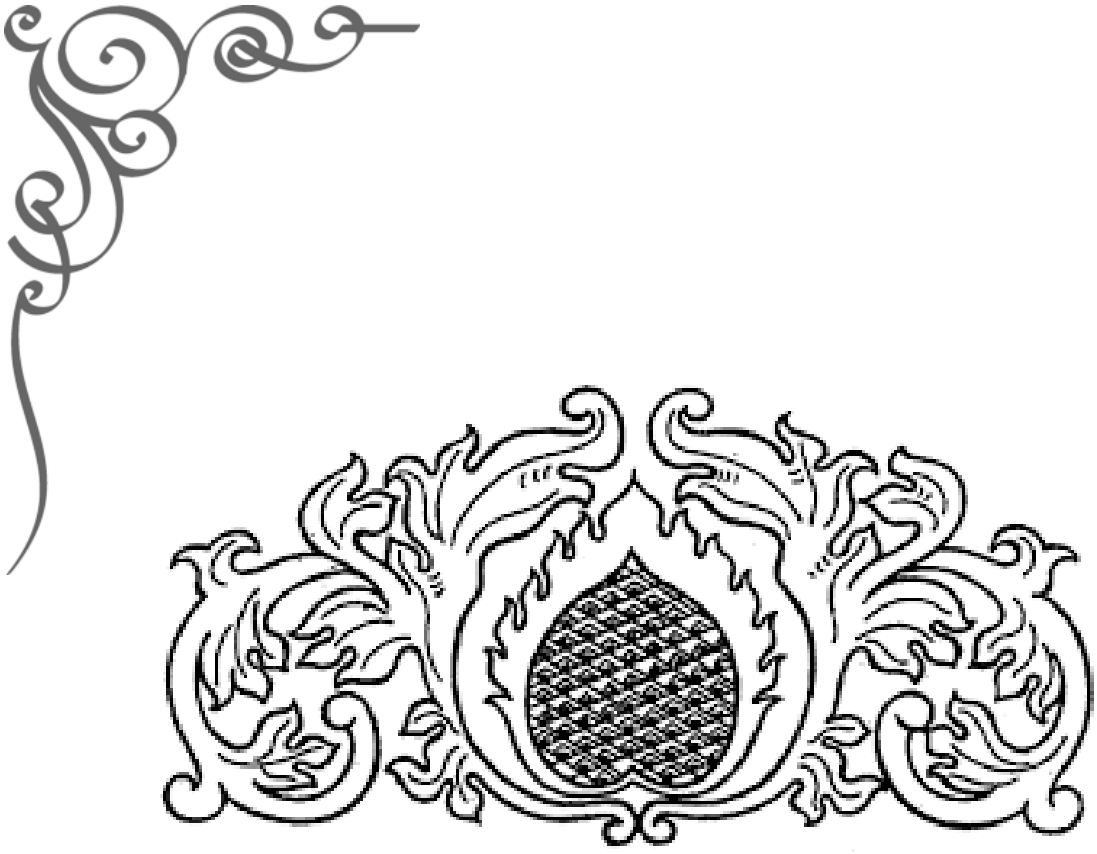
Towards the buildup to the conference the shutdowns became lockdowns and lockdowns became enforced quarantined curfews, yet the main committee of the IRC 2021 managed to work tirelessly around the clock. We knew it was all for a greater cause and I must appreciate the gargantuan task that was handled by the secretary of the IRC committee Ms Lihini De Silva who virtually was my prime buffer and the tremendous work done by the three co secretaries, Maj Ranushka Ferdinandesz, Ms Isuri Uwanthika and Captain Abeetha Athukorala. We were all supported by the dynamic team of faculty coordinators who labored hard and were endowed with patience.

It is with sincere gratitude I appreciate the services of Mr Kithsiri Amaratunga the president of the Editorial committee and Dr Faiz Marikar the deputy editor. I also want to mention the prudent actions taken my Commander Bogahawatte the president of the publication committee. I would like to thank all committee presidents, committee members, faculty committees, the office of Bursar, Registrar, Adjutant and C/O Admin and the staff at the Vice Chancellors office.

New normal pushed us to the limits, yet we managed to overcome as we functioned as a collective, yet finally the work would be incomplete if not for the researchers who had put faith in us and submitted papers and reviewers who filtered them. This year's IRC is the most decentralized event out of all IRCs, facilitating intellectual deliberations of this scale is no easy task. To keep this grid alive and robust the contributions made by Director IT and his team needs a special word.

We have truly embraced the new normal we have not run away from it we have transcended, thank you all for accepting and believing in us. We shall prevail and we shall overcome.
Thank you very much!

LAW



PLENARY SESSION

Session Summary

Session Chair: His Lordship Jayantha Jayasuriya PC, Chief Justice of the Supreme Court of Sri Lanka

Rapporteur: Mr. Managala Wijesinghe, Dean, Faculty of Law, General Sir John Kotelawala Defence University

Chair of the Plenary Session in Law was His Lordship Jayantha Jayasuriya, PC, the Chief Justice of the Supreme Court of Sri Lanka, and the speakers were Hon. Mohamed Ali Sabry PC, Minister of Justice, Hon. Susil Premajayantha, State Minister of Education Reforms, Promotion of Open Universities and Distance Learning, Hon. Mohan Peiris PC, former Chief Justice, and Permanent Representative of Sri Lanka to the United Nations, Ms. Farzana Jameel PC, Senior Additional Solicitor General, Dr. Joe Silva, former Principal, Sri Lanka Law College. The Session was attended by Hon. Sanjay Rajaratnam PC, Attorney General of Sri Lanka, Major General Milinda Peiris, Vice Chancellor of General Sir John Kotelawala Defence University, officers, staff, and students of the General Sir John Kotelawala Defence University.

His Lordship Jayantha Jayasuriya PC received his education at Maliyadeva College Kurunegala. Thereafter, he entered the Sri Lanka Law College and was admitted to the Bar in 1982. He obtained a Master of Philosophy degree from the University of Hong Kong on a Commonwealth Scholarship in 1992. He joined the Attorney General's Department in 1983 as a State Counsel and was promoted steadily and then ended up becoming the Attorney General in 2016. Meanwhile, His Lordship was sworn in as a President's Counsel in 2012. He is also a Solicitor in England and Wales. During his long career at the Attorney General's Department, he functioned as the Head of the Criminal Division and also assisted the Presidential Commission of Inquiry in Relation to the Activities of Non-governmental Organizations, and the Special Presidential Commission of Inquiry in Relation to the Malpractices and Corruption in State Institutions. He also functioned as a legal consultant to the Financial Intelligence Unit of the Central Bank. He also worked for the United Nations as a trial attorney in two war crimes tribunals and was awarded the Prosecutor of the Year in 2012 by the International Association of Prosecutors. He was appointed as the Chief Justice of the Supreme Court of Sri Lanka in April 2019.

The first speaker, Hon. Mohamed Ali Sabry PC is the current Minister of Justice of Sri Lanka. He entered the Sri Lanka Law College in 1992 and was admitted to the Bar in 1995. He served as Sri Lankan Consul General in Jeddah, Saudi Arabia, and represented Sri Lanka in many International Conferences including the Sessions of the United Nations Human Rights Council in 2012. In 2012, he was appointed a PC.

The second speaker, Hon. Susil Premajayantha currently serves as the State Minister of Education Reforms, Open Universities and Distance Learning Promotion. He holds an LLB from the University of Colombo and a Master's degree in Public Administration from the University of Sri Jayewardenepura. He is also an Attorney at Law and is currently reading for a Doctorate in Public Administration at Horizons University, Paris.

The third speaker, Ms. Farzana Jameel PC is a Senior Additional Solicitor General attached to the Attorney General's Department of Sri Lanka. She obtained an LLB degree with honours from the Faculty of Law, University of Colombo. She holds two Master's degrees in

Law, an LLM from the University of Colombo in Constitutional and Administrative Law, and an LLM (Merit) from University College London (UCL), having specialized in Administrative Law, International Trade Law, International Environmental Law, and International Law of Natural Resources. She also serves as a Visiting Justice of Appeal of the Court of Appeal of the Republic of Fiji.

The fourth speaker, Dr. Joe Silva served as the Principal of Sri Lanka Law College from 1995 to 2005. He holds LLB and LLM from the University of Colombo and a Ph.D. from St. George University. He is also an Attorney at Law since 1978. He has over 40 years of experience in legal education in Sri Lanka and abroad. He is presently a Vice President of the Commonwealth Legal Education Association.

The final speaker, Hon. Mohan Peiris PC currently serves as Sri Lanka's Permanent Representative to the United Nations in New York, USA. He was appointed as the 44th Chief Justice of Sri Lanka in January 2013. He was also the Attorney General of Sri Lanka from 2008 to 2011. In 1981, he joined the Attorney General's Department as a State Counsel. He obtained training from the National Institute of Trial Advocacy, Harvard Law School as well as Centre for Police and Criminal Justice Studies, Jesus College, Cambridge, and George Washington University while he was serving the country as a Senior State Counsel. He was a former visiting lecturer at the Faculty of Law of the University of Colombo.

Transcribed speeches of the plenary speakers are continued in the following page.

Sustaining Judicial Power of People Throughout the Pandemic

Hon Mohamed Ali Sabry

Minister of Justice

Your Lordship, Chief Justice of Sri Lanka, Mr. Jayantha Jayasuriya PC, the Hon. State Minister of Education Mr. Susil Premejayantha, the Hon. Attorney General, Additional Solicitor General, distinguished guests and distinguished colleagues.

First of all, let me congratulate and thank KDU for organizing or at least not suspending, and yet going ahead with the yearly plenary session. That itself is the new normal. I think new normal needs no further introduction than the manner in which you are holding today's conference itself. You could have easily found an excuse, the excuse would have been the pandemic; that there is a lockdown, and postponed it to the next year, but you thought otherwise. Despite all these difficulties, you have found a way and you convinced everyone else and you managed to get all of them on board in order to get it going.

So, when it comes to the judicial power of the people, it is inalienable. There are three powers as we all know, executive, legislative and the judicial power. Judicial power is not that government gives to somebody or the opposition imposes on someone else. It is people's right. A right in terms of the constitution. So everyone was taken on oath to uphold the constitution of our country, has a duty and an obligation to see that power is used despite any obstacle.

I am thankful, despite the difficulties and the challenges that the government has continued to make representation to open the court houses, at least for urgent matters even during the height of the Delta variant, this attack which we are undergoing right now. I am thankful, that the judiciary, judicial service commission led by His Lordship the Chief Justice and the Hon. Attorney General and his department giving all the support and encouragement to see that it happens, because freedom of people, liberty of the subject is of paramount importance. Everything else can wait a bit but not the people's rights, not the people's right for freedom, freedom of movement and liberty. If that is being challenged, we have to find a way to provide those services.

It is in that context that so many countries all over the world have innovated various ways and means in terms of which, during these difficult times, they have found a way to see that the judicial functions have continued. For example, in India, our neighboring country, the supreme court, the high courts and the district courts, from March last year have been continuously functioning, including the trials, online and I know from next Monday they are going for a hybrid system, in terms of which whoever who wants to personally come and present can do so (they will be given preference twenty-four hours in advance) and others can continue to work online. So, in that sense, this is a challenge and I also see this as an opportunity, if we use this as a catalyst for future development and transformation. If you look at some of the areas which are less privileged or less technically savvy, all of them have approved this. Most of us do not go to the supermarket and buy, we order and they will deliver. I know a vast majority of our farmers get into a particular app, I don't want to mention the name of the app, and they sell their produce and people buy their produce, form mangoes to pumpkin. People have gone to that level. So, if you look at it, unfortunately, what we do is going to be there for some time.

At the beginning of the pandemic we thought, several countries did very well, including Sri Lanka in the first wave. Up to this March or so, Kerala in India and Vietnam were in forefront of it but during the last two to three months, both Kerala and Vietnam are suffering massively due to the pandemic, just like us. We all thought Australia and New Zealand, with their massive landmass, limited population and a hefty budget and savings, could get over this because they had this contact tracing, and locking it down and now, they are also rethinking that zero infection is no longer plausible. If we look at Sri Lanka we played the cricket match last few days with no spectators, but I am sure most of you all have also seen famous cricket matches are going on in India and in England. Everyone without masks, packed house. That is because they have adapted to it. They have

vaccinated themselves, followed the protocols and taken that minimum amount of risk. Otherwise, we will have to close everything down and wait.

Yesterday, if anybody followed the news, you would have seen the Finance Minister announced the loss to the economy due to the lockdown. Just three weeks of lockdown, the loss is amounting to about 1800 billion. This cannot go on. So we need to find a way as to how we can move on. It is in that context I think that there is no exception when it comes to the judiciary and the people's power to go to courts and fight for their rights. Which is not anybody's giving as I said, this is their right. So, we need to ensure that right is being properly exercised and give a platform for them to do that. It is in that context from the beginning, we, in discussion with the Bar Association of Sri Lanka, with the JSC and the Hon. Attorney general, had rolled out several programs. First, we kept courts open. Recently it was not mentioned, but I must admire and acknowledge his Lordship Chief Justice, personally intervened and said that courts also have to function. By that time, I also had spoken. That is the commitment we have to ensure the function. Similarly, the Hon. Attorney General, on a few occasions when we had a massive number in prisons, when there was an outbreak, came out with very innovative suggestions and solutions to meet those. Thirdly when we went through a prolonged period of lockdown, we managed to provide whatever the services of requirements wanted by the JSC in the Supreme Court, Court of Appeal and other courts, wherever they were wanted, we provided them with laptops and other equipment in order to have e-hearings and luckily our judges had been proactive in that, at least in cases which involve the liberty of people, bail applications and things like that. There are so many other areas similar to that. Urgent cases where somebody's property is going to be auctioned because some people can be unconscionable even during the pandemic. So you have no other place to go other than to court to assert your rights. Therefore, it has to be open for urgent matters. It can be one or two persons but liberty of that person is more important than anything else. So we have to ensure that it happens. There are maintenance cases that go to the root of their existence. There are domestic violence cases, there are cases of child abuse and child safety. So we have no choice other than adapting to new normal just like schools, tuitions and businesses. This is a good opportunity for us to adapt, and therefore, I think we must make use of this as an opportunity to move forward.

As far as on the Ministry's side, we have continued to engage with all the stakeholders, both official and unofficial bar with the concurrence and support and the approval of the JSC to roll out the program wherever it is necessary. So we hope that this will go to the next level. In order to provide that, our Digitalization Committee was constantly in touch with the Judicial Service Commission and we have come up with the rules permitting e-hearings. We have gone one step further and we have promulgated the Covid-19 Act which allows e-hearings. We have connected the Court of Appeal with most of the prisons in the country. So that appeals could continue to go on when the situation gets a little better. Without their presence they can watch the proceedings. We cannot afford one or two years of total closure on top of the massive pressure on the judiciary itself. We have around eight-hundred-thousand cases to be determined by three-hundred and fifty judges. So it is a massive challenge. Blessing in disguise I see in this is to adopt the technology.

I was chairing the Law Ministers' Conference of the Commonwealth countries. There were fifty countries which took part in that. It was very refreshing to hear that from small countries like Bahamas and Bangladesh to Canada, countries around the globe who come under and form the Commonwealth, the innovative new ways they have adopted particularly using technology which is basically on e-hearings, e-arguments, e-documentation, e-filing, e-issue of proceedings, they have gone a long way. So I'm sure that we are in the process of rolling out the digitalization process. We signed a four party agreement with the ICTA, JSC, Ministry and the EY to roll out the digitalization process. Probably from January we can roll that out at the first instance for forty-two court houses, that is for the comprehensive solutions. So what I feel and what I see is that we must make use of this as an opportunity to immediately go to that step we couldn't go. Luckily, now the Customs is fully automated. Everything takes place in the customs through online applications, online clearance, and online submissions. So it is possible we need to find a way to do that.

But some areas, for example, in some government institutions where proceedings are there, you can only make an application online. You still have to go there, take a printout, pay the money and one week later they pay. That is not working. So we need to find a way. If that is there you have to have a payment gate also. You should be able to pay online. They should be able to charge that online and they should be able to e-mail that document. Otherwise it is not digitalization. It is actually a hybrid mechanism. So it is important that we move on with it.

I won't take any longer than this. I invite KDU also to do a research paper and submit to us, to show how we can do it better. England had Nightingale courts during the pandemic for urgent cases. E-hearings were permitted. Some places they have a hybrid system half online and half physical hearing. I think, for us to sustain this method, we should invoke this technology and e-hearing and e-filing and we should continue to have this even after normalcy returns. Then only we can sustain and slowly transfer to that. Otherwise what happens is we come up with all these things and we do it for a month or so and we come back to normal and totally go back to physical, then something goes back and no one understands and you have to start it all over again form the scratch. Therefore, my presentation would be, whatever the circumstances would be, whatever the difficulties we may have, courts have to function. It is our duty to see that the courts would function. As stakeholders in getting the courts to function, we have to adapt and use a little bit of common sense like we have done with the Hon. Attorney General's advice and JSC's concurrence, regarding bailing provisions in these trying times and then adapt technology and go on to the next level, so that it will ultimately be a blessing in disguise that this came and we adapted the technology and it ultimately speeded our path to more efficient and efficacious judiciary. I always say and I can say without any hesitation in our judiciary by far, independence is not an issue. We have always stood by. One or two cases here and there some people can suggest but we have always been a very independent and a strong judiciary. We are proud of our judiciary and we are proud of our judges, but because of the sheer scale of work and the outdated laws and less than ideal work environment and facilities, we cannot say the same about the efficacy and efficiency. So I think this could be a catalyst for us to move on towards that direction.

Thank you very much for giving me this opportunity, and I wish the Conference and KDU all the very best.

The System of Public Administration in the New Normal Environment

Hon Susil Premajayantha

State Minister of Education Reforms, Open Universities & Distance Learning Promotion

Your Lordship, Jayantha Jayasuriya, PC Chief Justice of Sri Lanka. Hon. Mohamed Ali Sabry, PC The Minister of Justice. Hon. Mohan Pieris, Former Chief Justice and Permanent Representative to the United Nations. Hon. Attorney General Rajaratnam, PC, The Vice-Chancellor of KDU, Dr. Joe Silva, Former Principal, Law College, Senior Additional Solicitor General, Respected Academics, Guest Speakers, Professionals, Administrators, Ladies and Gentlemen.

First of all, I must thank Your Lordship Chief Justice Jayantha Jayasuriya, PC for the introduction today on me. Let me congratulate the Academics and Administrators of KDU for their high performance as a University and for organizing this very useful and timely conference on challenges faced by the Sri Lankan Legal System in the context of New Normal. I thought of making my presentation on the challenges faced by the Sri Lankan Legal System in the context of New Normal as well as the Public Administration, because the Justice and the Public Administration, these two subjects, there are many poor relation situations that we are experiencing.

With my experience as a politician for more than 21 years in Parliament, holding different portfolios and during that period especially as the Minister of Science and Technology, I have attended so many research symposiums organized by different faculties of our Universities. With experience, I believe most of the research of our researchers is based on fundamentals. Very hardly you will find researches based on Applied Systems.

Therefore, first of all, I take this opportunity to focus the attention of the University Authorities, Academics, and Professionals to guide our younger generation to engage with research especially on applied research because at this stage we need our young graduates, postgraduates engaged with applied researches and come out with very good proposals especially in the New Normal situation. It is my personal view, and I saw some articles appeared in newspapers and on the Internet, one of the United Nations spokesmen has told that the most affected SDG goals are Goal number 1 - Poverty Alleviation and Goal number 4 - Quality Education out of 17 SDG goals. So I am engaged with number 4 - Quality Education. So let me speak few minutes about the education that we are facing today, because of this COVID-19 pandemic situation.

Here, in our country, we have more than 10,165 Provincial and National Schools, over 85 Private Schools, over 392 International Schools, over 800 *Pirivenas* and there are 25 Schools for Special Education. In this whole system, you find a 4.3 Million student population with 250,000 teachers, 13,000 principals, and administrators over 4000. So in this system of schools, especially, the general education from the pre-school stage, grade 1 to 13, what we call the general education, is the most affected area due to the COVID-19 pandemic situation. For example, in the year 2020, after the 19th of March, all schools were closed down by the Government and we had only 65 school days out of 210. But we managed to hold the grade 5 Scholarship Examination, O/L Examination, and the A/L Examination. In 2021, except the Western Province, in all other 8 provinces schools were open from the 3rd of January until the Sinhala New Year. But, in Western Province, all schools were closed and we have had only 5 school days so far. So it's a big challenge for us, but we are using the distance modes, the FM channels and Television channels, we have 5 Television channels 4 Dialogues and one Rupavahini. By using that, we telecast over 7000 contents from grade 1 to 13 in Sinhala medium, Tamil medium, and even in English medium. So, I want to tell all of you that with all these challenges we tried to keep alive the education system in our country. Otherwise, of course, if we continue to close down all the schools and without any kind of education to our younger generation, we do not know where we will end up. But the Government and the Ministry are trying their level best to educate our children through online, televisions and FM. So, now I would like to

speak about the challenges that we are facing today, especially in the legal system.

I wish to share some of my ideas about one of the serious challenges that we all in Sri Lanka are facing today on challenges faced by the Sri Lankan Legal System in the context of New Normal. Before I assumed duties as the State Minister, few months I was practicing in Hulftsdorp in criminal courts after many years. However, I found over 20,000 legal practitioners all over the places in the country so they are also facing hardships. I know personally, especially the young practitioners facing so many challenges to engage with their day-to-day practice. And due to the closedown of Courts and due to unavoidable circumstances of postponing the cases, so they are responsible for their litigants not only that, of course, they are losing their earnings day to day, that is my personal experience in Hulftsdorp. I know Hon. Minister of Justice, he knows very well as a practitioner. The challenge is how to ensure that our Legal System and Public Administration are driving forward in order to provide leadership in solving problems in the New Normal environment treated by the COVID-19 pandemic.

Let me first describe the nature of the New Normal environment as I see it. The impact of COVID-19 on the environment of our economy must be understood in terms of the immediate or the operating environment and the macro of the global environment. Hon. Minister of Finance recently explained in Parliament, the economic situation in our country due to the COVID-19 pandemic situation. We have lost all our local remedies except Exports. We have lost the Custom Duties, Excise Duties, VAT, and Income Tax. So we have lost, as Hon. Minister said over 1600 Billion this year. To maintain the public service including the Judiciary, we need over 1900 billion every year, apart from other capital expenditures. However, it is the responsibility and government to discharge the duties to maintain the normal lifestyle of the people in our country. So I must highlight few things especially in the field of Legal System. The challenge that the Legal System has to face today is, let me remind you that the Legal System is well structured as stipulated in the constitution and the Judicature Act. But I suggest, our Minister of Justice is here with us, and he is seated next to me in Parliament.

So I have to point out some of the important issues and demands of the new paradigm of work that is evolving fast including the following. Maintaining law and order in the country is a challenging task. Delivering justice to every party using our technology, Zoom and Skype technology. Bail procedures in criminal cases, conducting trials at original Courts, delivering judgements without delay. And I take this opportunity to thank his Lordship the Chief Justice, our Judicial Service Commission, AG's Department for taking appropriate action to keep alive the Legal System in the country with the assistance of the Minister of Justice in this terminus atmosphere. Our future is not an easy extension of the past anymore. We have to think of a new future that departs from the past ways, seen problems and past ways of finding solutions.

Your work towards the Legal System of Sri Lanka is driven by the Constitution and the Judicature Act and related Laws and Rules. But I suggest that we need some limited amendments to Civil Procedure, Criminal Procedure, related Laws and Rules to keep alive the Legal System in our country with the challenges of the COVID-19 Pandemic.

In Sri Lanka, we have a well-structured Administrative System. We have 09 Provinces, 25 Administrative Districts, 335 Divisional Secretariats and 14,025 *Grama Seva* Divisions. This is a hierarchical pyramid check structure inherited from British rule. But, there are a lot of amendments introduced especially after the 13th Amendment to the Constitution.

As a result of the 13th Amendment we have 09 Provinces, within these 09 Provinces we have 25 Administrative Divisions and as I explained, Divisional Secretariats and *Grama Seva* Divisions. In those levels of course you will find so many government institutions. For example, for each and every Provincial Council we have a Governor, The Chief Executive, and The Chief Secretary and 5 Minister Secretariats and the Provincial Office, the Zonal Office, the Divisional Office and thousands of Officials assigned duties respectively. So we can use this structure. Similarly, in the field of the Health Sector we have Provincial heads, Deputy Director Generals in the MOH office, PHI and Midwives. So similarly, in the field of Education, we have 09 Provincial Offices, 99 Zonal Offices, Divisions and then the School System. So we can

use all these structures to decentralize the implementation of the policies and the decisions taken by the sector. So similarly, we can apply this same pattern or the same system to the judicial system.

Therefore, I suggest Hon. Minister of Justice and Your Lordship the Chief Justice and all the participants in this research conference to think about how to apply the existing structures and human resources as well as the physical resources with limited fund allocation to overcome the challenges that we are facing in the field of Legal System as well as Administrative System. We have to live with this pandemic. The view of the Scientists and Doctors is that at least for the next 3 years we will have to control this and at the same time we have to live with this. So, if that is the situation we have to change our attitudes and we have to adapt to the New Normal situation not only in other fields but also in the Legal System and the Public Administration system. For this purpose, the Law Faculties in our University system should encourage Law students to engage in applied research with the guidance of University Academics and Professionals. So, in that regard, this research conference is very important and with all these challenges they managed to organize this very important research conference with the participation of very eminent personalities today. So, once again I thank The Vice-Chancellor of The KDU and the Faculty of Law for inviting me to this very important session today.

Thank you very much!

Legal Reforms and the Functioning of Courts in the Era of the New Normal

Ms. Farzana Jameel

Senior Additional Solicitor General

My Lord, the Chief Justice, Mr. Jayantha Jayasuriya PC, Hon. Minister of Justice, Mr. M.U.M Ali Sabry PC, Hon. Attorney General, Mr. Sanjay Rajaratnam PC, Hon. Minister Mr. Susil Premajayantha PC, Mr. Mohan Peiris PC, former Chief Justice of Sri Lanka and Sri Lanka's present permanent representative for the UN, The Vice-Chancellor of KDU, the Dean of the Faculty of Law of KDU, Mr. Mangala Wijesinghe, all participants, Ladies and Gentleman, Good Afternoon.

Thank you for this opportunity to say a few words on the topic given to me – Challenges Faced by the Justice System in Sri Lanka under the New Normal. We have now got used to this phrase new normal, which has been spoken up all the time. I would like to match it up with what I would call the new possible. If we go back a bit, in the middle of March 2020, Court buildings around the world began to close. In response to the rapid spread of the newly identified coronavirus, within days, an alternative way of delivering justice or a court service was put in place in many jurisdictions. Many countries immediately enacted legislation. In Singapore, they enacted it in the early part of 2020 itself. Upon the heels of the virus taking over, the uptake of the various technology accelerated justice systems in numerous countries. When we look back now, we find that most countries have been best adapted to the crisis. Which regard to the judicial system, certain countries already had in place an ongoing electronic or e-court system. The current crisis that has been triggered is not only a health crisis but also a socio-economic one that imposes serious threats to our lives.

In the 10 minutes I have been given to speak, I would like to break my speech down into a couple of points - public health and safety, and the disposal of justice which seems to be the main aim of this whole program. The latter then leads us to the allocation of resources to the infrastructure related to the judicial system. When prioritizing those resources, the courts have to decide how to triage our cases. One also needs to look at the difference between digitization and transformation. Digitization does not necessarily mean transforming the legal system which is what I think will eventually happen because of this crisis. During this period, we would have to be conscious of the existing backlog of cases that were already in place before the crisis, and the continuation of the backlog during the time of the pandemic, as well as COVID-triggered litigation.

In my view, this entire crisis will have to be looked at and the solution has to be looked at from moving away from the traditional court system and the courthouse system, to a new norm which would then become the new possible. But for that to happen, we need to completely change our mindset and in that process, what I think would trigger the change, is the role of technology. The speakers and his Lordship the Chief Justice have already adverted to the role of technology, the acceptance of new norms, and the results of those consequences.

In looking at this topic, I am most fascinated that many countries in the world have looked at this new system. Professor Richard Suskin who is a technology adviser to the Lord Chief Justice of England and Wales, who calls himself a legal futurist regards in his book - The Online Courts and the Future of Justice - the pandemic as a steppingstone to change how the world looks at the justice system. This is exactly what our Justice Minister told us in his speech. Until a few weeks ago or a couple of months ago it would have been unthinkable for any of us to believe that non-physical courts and remote hearings could be regarded as a fair system or as complying with Rule of Law requirements.

In this context, we will need a whole change of mindsets to accept this new system of administering justice - that one does not need to be inside a courthouse for justice to be dispensed.

This pandemic has taught many countries to realize that one may not be sitting in a courthouse to dispense justice.

The fundamental question that will arise in the aftermath of the crisis is whether delivery of justice, a service or a place? While we are all used to the grandeur of the courthouse, the question will arise of how governments should prepare for the future. What should these frameworks be like? The paramount consideration at the time of the crisis descending upon us, was the health and safety of the public. The economy and everything else took a backseat. But policymakers now know that they must make trade among competing values in the pandemic. Sometimes it appears to us that what we thought was important before would have to get to the back burner while more important things are being taken to the forefront. While we experience this huge disruption in all economic and social activities, we are all preserving differently how business is to be done, how services are delivered in the future.

One aspect we need to consider is the digital transformation and electronic filing of documents. Our legal system, with the help of the Chief Justice and the Minister of Justice has taken us into a digitization process. But the question is how much we can do to ensure that the dispensation of justice is not interrupted in a way that affects the quality of justice that is dispensed. In that regard, the first thing we need to consider is whether justice a place or a service. Do we really need to gather in one place in a particular building to settle our legal disputes? In the United Kingdom last year, on the 24th of March 2020, the courts held their first case digitally and online. The whole case was heard online. Now the question is whether we are making digital tools to access justice during the pandemic. While we do that, in my view, we all need to take into account the fact that not everybody has access to or equal access to electronic resources. To overcome this, the UK established a court system called nightingale courts. In different locations, they continued the work of the judiciary.

However, again you have to be mindful of public safety, the safety of witnesses, and the safety of the judges. In some courts, they had a hybrid system where, half of the judges would sit in one courthouse, and the other half in their chambers.

In my opinion, the challenges we face in the 'new normal' with regard to administering justice, are twofold – challenges in managing physical infrastructure and challenges in managing resources. While managing the physical space - the availability of the courtrooms - one has to manage the prioritization of cases. How do you set criteria for priority? Defining, refining, and setting criteria for what is critical, urgent, and necessary is going to be a challenge.

In the initial stage, mobilizing new processes is going to be a challenge. Giving access to courthouses and training of staff and changing the mindsets of the lawyers and the litigants is going to be a challenge. Is the litigant going to be happy about allowing his counsel to work from home and be the only person who has access to the court and the judge and him not being a part of the hearing process? That we will have to consider in implementing the new system.

Relaxing deadlines and processes is another challenge. Many countries have already effected that by moving the prescription timelines. But then the question will also arise in relation to fairness in allowing one party to benefit from an extended timeline. Being given a timeline extension until justified could be detrimental to the other party.

The next question is how to deal with trial courts and appellate courts. In my humble opinion, appellate courts will have fewer problems than trial courts. Answering the question of whether the distribution of justice is a place or a service, will depend on how one is able to give access to justice. What is meant by access to justice is not simply filing a case in a court and having it called and been taken up on time. But also, what is the nature of the court presentation? What is the nature of 'what goes on'? how much of the argument has been heard? What is the nature of participation of the litigant? Is there substantive and procedural justice? Is there a fair process followed? Is it transparent? Do the litigants know what is going on? Is it accessible? Is it proportionate? And is it sustainable? Do we have the resources to go and present in this system right through? So that is a challenge that we will be faced with. It is not purely the filing of the document electronically, that will solve the problem for us. It will also be what type of hearing we are going to be satisfied with.

Secondly, a hybrid system is where part of the trial is heard in person and the other part on paper. So how much of staff can be there? For how long can they be there? Those are challenges with regard to infrastructure and resource allocation.

Apart from managing physical infrastructure, there will also be a time when we will have to consider the competing pressures of all parties - the court, the litigant, and the counsel. With regard to jury trials, the question is whether the jury, as judges of facts, would arrive at a different decision when they sit together in a jury room. The predominant of the findings of research that has been carried out in the recent past is that a group of people sitting together physically has a particular result, as opposed to seven or ten people sitting apart in their own different spaces. Therefore, whether the result would be affected by not sitting together physically is something that is going to be a challenge.

Then, the second aspect is when you change the entire scenario, whether the result eventually will be just or whether the absence of the physical human being with each other would affect the element of justice. Some people feel that it is not going to result in that pure type of justice that they conceive from a physical hearing. But having said that, in several cases of international arbitration and international dispute resolution mechanisms, virtual hearings have become the norm across the board. But I think the challenge for the legal system of Sri Lankan that is slightly outside of the legal system of other jurisdictions under consideration is the allocation of resources and the allocation of personal and ensuring that the virtual court does not take away the substance of what is delivered by the real court.

With great respect, I would like to say that we in Sri Lanka have just passed our Covid temporary provisions Act. Whether it will have to be temporary is a matter that only time will tell, but whether we are going to use this opportunity to triage cases and move certain cases completely into virtual hearings is something that I think the policymakers will have to think about, and in doing so, we are looking closely at the role of technology and how technology is going to assist us.

I would think that the Indian Supreme Court which has already got in place its system was able to get off fairly well. There is no doubt that we are at the foothills of the transformation of the court service. So, the challenge would be to ensure that documentation reaches the parties on time. Gets to the correct person within a reasonable time.

The studies reveal that, in Singapore for example, if a person were to ask a court to take up a case urgently, there is a minimum time of five days given so that the other party could present itself in court. I think each country is doing what works best for them. But there is no doubt that the challenges we in Sri Lanka are facing are going to be common to all countries. Because the pandemic hit everybody in a common way.

The only difference was that those countries that already had an electronic filing system in place, were able to grapple with it easier and move forward quicker. They already had in place certain infrastructure that could help them to move forward.

Whether we are going to do audio hearings completely, or video hearings only, or total paper hearings, will depend on the change of the mindset. I would like to end by saying, that the physical environment in which legal proceedings are conducted does have an impact on how we perceive justice. When a person is in a court is quite different from when a person is not in reality, and the courtroom layout as we know reflects the relationship between participants, the judge the lawyers, the witnesses, the jury, the accused, and the public. There are times to get up, to sit, to stand, to bow. This is the system of justice that we are used to. How much of it are we willing to give up, and how much of it are we not willing to give up is a matter that we will have to be seriously concerned about. The symbolism and the formality of the physical aspects of the courthouse combined, give us and show us the solidarity, and the respect that we pay to justice as a legal process, but then it is clear that if we are going to move from this physical courthouse system to a virtual system, we will have to separate those cases that definitively need physical presence from those cases that do not need the physical presence of the parties or the litigators.

This has to be done while bearing in mind that not everybody has access to digital resources. What they did in Singapore was that the courts created physical rooms for those who were unable to access digital courthouses. Whether we in Sri

Lanka will one day have to do that is something that our policymakers will have to look at. No doubt there are several benefits of virtual hearings but with that one cannot run away with an idea that there are absolutely no problems with it.

There is no doubt that the digital hearings are here today. But going virtual will open the door to complete integration of the legal teams and all the people that are in the justice system. I would like to close by saying that, taking from what Lord Chief Justice said, what Minister of Justice said, and what Minister of Education also said, that the distribution of justice, dispensation of justice, dispensation of the administration, is a fundamental matter that cannot be deviated from how we are going to do that in the pandemic. You should be ready for a change of mindset, to use digital technology in a way that it is most beneficial to us without compromising the quality of justice and with the access of the litigant to justice by making him know by having confidence in the system that there is transparency, and the system is working for their benefit. Because ultimately, the dispensation of justice is for the litigant, he is the most important person in the whole process. So, I would suggest, and I think that we are moving in the direction of exploiting the opportunities of information technology that is giving us the modern system of courts and trials. But transformation and digitization are two different things. Transformation is transforming the legal system so that the procedure of courts and the evidential rules would change to permit litigation in those different modes to be accepted.

Therefore, prioritization, collection, and distribution of the resources would be a challenge for us, and I see the pandemic as an opportunity to do things previously that were not thought possible, by using technology. I think a couple of years from now, looking back, the greatest legacy of this pandemic, would be the de-centering, and the displacement of litigation, as we know it with lawyers and human beings pleading before another set of human beings. The question that all of us should now be asking is not merely how we can safely open the courts but also how we are going to have the post-pandemic justice system and how different it is going to emerge when the pandemic is finally over. In my view, the challenge is to ensure that the cases that are filed do not get unduly postponed and cases that are to be filed do not get blocked at the entrance and that the resources we have are used efficiently to the advantage of the system of dispensing justice.

Thank you.

Revival of a Past Decision to Meet Challenges to Our Legal Education in the New Normal

Dr Joe Silva

Former Principal of Sri Lanka Law College

Your Lordship, the Chief Justice, Jayantha Jayasuriya, PC; Hon. Minister Ali Sabry, PC, Minister of Justice; Hon. Susil Premajayantha, State Minister of Education Reforms, Open Universities and Distance Learning Promotion; Mrs. Farzana Jameel, PC, Senior Additional Solicitor General; distinguished delegates, ladies, and gentlemen. First of all, I wish to thank Major General M. P. Peiris, Vice-Chancellor; Mr. Mangala Wijesinghe, Dean, and the Faculty of Law of the Kotelawala Defence University, for the invitation extended to me to make a presentation at this prestigious conference. I consider it a great honour to be in the presence of such a distinguished audience.

On a personal note, I would have been very happy if I were able to be there personally. But you know, I am unable to do so due to various constraints now present in the 'new normal'. It gives you the sense of nostalgia, that I speak today, as my house is just a few minutes away and two roads across from KDU. It is not the same old Kandawala Mawatha now. That was say, about 30 years ago. KDU has completely changed that scenario with magnificent buildings, a beautiful lake surrounded by a walking track, making for a pleasant environment. More than anything else, KDU has made a name for itself as one of the leading higher education institutions with a reputation for academic excellence for outstanding as a beacon of hope for higher education in the country. Congratulations Kotelawala Defence University.

Now, reverting to the main topic. The main theme of the conference is "Security, Stability and National Development in the New Normal". It is an undisputed fact that the legal profession plays a vital role in those aspects of national development, and the foundation is laid in law school with a vibrant legal profession. The topic of my discussion today is on reviving a decision from the past to meet challenges to our legal education in the 'new normal'. In order to make a logical presentation related to this theme, I embarked on research for an authoritative definition of the term 'new normal' and found none in the lexicons. Most dictionaries had entries on 'normal' but not 'new normal'. 'Normal' has been described as typical, usual, ordinary, what you expect or a way of behaving that is usual or expected. However, I found many explanations of this term in a number of other sources. One writer, for example, attempted to explain it, with reference to 'old normal' and 'new normal'. 'Old normal' is a situation that existed prior to, and the 'new normal' is after some event, calamity, or disaster. Dr. Jennifer Ashton in the book titled '*The New Normal*', that she co-authored with Sarah Toland says, "The asteroid has hit, and it has ushered in a whole new era and with a pandemic era, what we do, how we think, what we fear and what we believe in are all drastically different and will be the same for years to come." She goes on to say that people will think twice before being in crowded places, won't be eager to hug and shake hands, and sanitising stations will continue to exist. Some will continue to wear masks and keep social distances. She adds, "The pandemic has been tragic, terrifying and disruptive enough that all have a touch of PTSD- that is post-traumatic stress disorder." "The asteroid that hit our planet is a virus called COVID-19. On 11th March 2020 WHO declared it a pandemic. The world braced itself for the impact with lockdowns and travel restrictions. Economies came to a halt, millions got infected, and many died. Job losses and bankruptcies followed. Mask-wearing, social distancing, sanitisers, quarantines, and self-isolations became common. Cases of anxiety, depression, and mental illnesses began to rise. Vaccines came into be administered on a massive scale. As the asteroid has hit the planet, a new environment has emerged, and if any species are unable to adapt themselves to the new environment, they will vanish like the dodo who became extinct due to the loss of habitat and losing the competition to other animals that evolved." Thus, COVID-19 has impacted practically every aspect of our lives.

In this presentation, however, I will focus on information technology that has come to the forefront to fill the gap created by restrictions on social gatherings and interactions. Consequently, online shopping, video conferencing, zoom meetings and webinars, have become the order of the day. Now how have the profession and the clients reacted to this situation? Clients seek legal services to avoid disputes and to resolve disputes. They are not concerned with the mode of delivery of service, but one of speedy, efficient, and easily accessible service despite the change of the environment. The legal profession, on the other hand, has been conservative, slow to change, and has always been behind social change. However, they have now come to realise that unless they adopt innovative methods, they will lose to other animals, competing for a share in the market, such as accountants.

Richard Soskin, a solicitor in London, has written a number of books on law and technology, and his first book in 1996 was '*The Future of Law*'. He said in that book, that email would one day be the main means of communication between lawyers and their clients. You'll be surprised to know, the response of the Law Society of England and Wales. They declared that he was bringing the profession into disrepute and banned him from public speaking. In this book, he further predicted, "We are in the brink of a shift in legal paradigm, a revolution in law, after which many of the current features of contemporary legal systems which we now take for granted will be displaced by a new set of underlying premises and presumptions. Much of the law will be radically different." Page 41 of the book. His prediction was frowned upon at that time. Nevertheless, it has now become a reality with the pandemic.

The asteroid that hit the planet has now changed the mindset of the lawyers and the judges. The Supreme Court of Justice is the highest court in the United Kingdom. It replaced the House of Lords which has been the bastion of tradition and conservatism. The highest court has now changed. Lord Lloyd Jones, Justice of the Supreme Court in the UK, in a recent discussion at the Institute of Advanced Legal Studies in London explained that the Supreme Court judges now work from home. The cases are heard online. The proceedings are Livestream so that the general public can watch them as if they were present in the court. All court documents are digitized and the lawyers file appeals and relevant material in electronic form too. He says that it has many advantages. It is easier now to look at relevant information with the press of a computer button instead of turning pages in the bundles. He adds that the change has been possible due to the excellent support they received from IT experts. He predicts that even if some form of normalcy returns, the practice of using digital bundles, video conferencing, etc. would continue. They have also found the advantage of online hearings by the Privy Council. The appeals come from faraway places of the Commonwealth. The counsel can now address courts from their own countries without travelling all the way to the United Kingdom. It is much easier to get them together online.

I have recently listened to some webinars by IT savvy, young Sri Lankan lawyers who are very enthusiastic about the new developments and advantages of providing easily accessible legal services without undue delays. If these are going to be the future, is the legal education in Sri Lanka equipped to face the challenge to produce lawyers capable of working in the new environment? Since most of the teaching in the future is going to be online due to restrictions on social interactions; modalities of teaching, learning, and assessment have undergone a radical change. Virtual learning environments have been created to give a feeling of real-time teaching and interactions between teachers and students, and among students with one another. If one looked at the websites of foreign universities, one could observe how they have responded to the COVID situation. These sites allow teachers to upload or link to various resources such as e-libraries and documents, videos, etc. They have facilities for setting up forums and a number of interactive features.

The Academic Staff of Sri Lanka Law College has done their best to teach online, using whatever facility is available today. Although this is an admirable step forward, one has to go further and create a comprehensive virtual learning environment. Sarah Hallowell, the head of the academic work of LexisNexis speaking on the impact of COVID on profession and legal education, says that the need of the hour is to focus on investing in technologies and systems that reflect those used in the legal environment. It would increase the employability of law graduates. Law

firms look for people who know how to work in the new environment. They do not wish to waste their time and resources in training law graduates again. Sri Lankan universities and the KDU have the resources such as IT experts and senior academics to design delivery of academic services and conduct assignments online. Plus, they have funds from the State. On the other hand, Sri Lanka Law College has to depend mainly on part-time lecturers who rush from courtrooms to the College to deliver lectures. They have no time to engage in research or training to design lectures and assignments to suit the modern modes of delivery. Neither does the College has the finances to invest in equipment and obtain the services of experts. Perhaps not many are aware that the College is not funded by the State or any other sorts. It has to depend solely on the fees charged, which is hardly sufficient to meet even the routine expenses. Hence, the academic aspect should be handled by universities that have the capacity to radically change the content, mode of delivery, and assessment of subjects.

In this exercise, artificial intelligence will play a dominant role. For example, it may not be the same old contract law. It will include online transactions, computers making offers, and acceptance. Students should have some knowledge of technical tools to analyse data on contracts, online dispute resolution mechanisms such as eBay, Amazon, etc. Similarly, the criminal law will have a lot of content on crimes committed via IT. Cybercrimes such as bullying, trolling, etc. Only the universities will have the facilities and expect you to research and develop content for such modules to suit the local environment.

Law College would therefore focus solely on practical aspects for which they are best suited and play a role similar to that of the Bar Council and Law Society in the UK. In fact, a similar proposal had been made nearly 100 years ago. Some may argue, we had our legal education at the Law College, and some of us are at the top of the profession today, why then change this role now? It is because the asteroid has hit the profession hard, and in order to survive, the College has to allow universities to do academic subjects and the College to focus solely on practical training.

It appears Sri Lanka is the only country in the Commonwealth where a person can be a lawyer without a University Degree. Today there are a number of universities and institutes of higher learning, providing courses for LLB qualification. Unlike some years ago, there are ample opportunities now, to obtain this qualification. It is a waste of limited resources to duplicate teaching of academic subjects in the universities and the Law College. At the time, the College was started over 100 years ago, there were no universities in the country offering courses in law. The original intention was to hand over the teaching of academic subjects to the University of Ceylon once it was set up.

Let us recall what is on the website of the law faculty of the University of Colombo referring to the history of legal education. “The next stage of the evolution of the legal education in Ceylon was initiated in 1923 by Chief Justice Anton Bertram, who pointed out grave defects in the education provided by the Ceylon Law College. He appears to have realised the limitations of the largely vocational training given by part-time teachers at the College and to have had in mind the broader objectives which the university teachers are expected to follow and wider horizons they can open to the students in the environment of a university. His suggestion with the Council of Legal Education accepted in 1924 was, that a major part of instructions of the law students be transferred to the Faculty of Law at the proposed University of Ceylon, leaving the Law College to provide a postgraduate course of instructions on what was termed practical subjects, but 11 years later, the Council went back on his earlier decision. Professor Nataraja, convocation address, the University of Colombo.”

I hope that the delegates in these sessions will focus on how the universities should adapt to the new habitat and introduce curricula with artificial intelligence content. Sri Lanka Law College which has sedulously done an immeasurable service to the legal education and legal profession could devote to the provision of meaningful and effective practical training, which is of most importance to make a good professional and leave the teaching of academic subjects to the universities. Hence, I comment to the delegates to consider this proposal at their deliberations. One might ask the question, what could we do now when the Council of Legal Education lost this opportunity to implement it when they had all the powers at that time, without

the constraints that the Council faces today. May I respond with the words of Sundar Pichai, CEO of Google, to a Graduation Class in 2020; “History will remember you for not what you have lost, but for what you have changed. I am optimistic you will”.

I congratulate the Vice-Chancellor, Dean, and the faculty for organizing this conference and wish the delegates a very successful conference.

Thank You.

The Court Mechanism and What We Can Expect in the New Normal

Hon Mohan Peiris PC

Former Chief Justice and Permanent Representative to the United Nations

His Lordship the Chief Justice, the Dean of the Faculty of Law, members of the Faculty, members of academia and most importantly, my dear students. I have been asked to speak to you today on the Court Mechanism and what we can expect in the new normal.

My dear students, our Court system currently faces, in my view, three major challenges. Two of these arise, as someone said, directly from the virus and they are somewhat new to us, while the third is a perennial problem. The first challenge is to maintain, perhaps you will agree, a sufficient level of service while our traditional courts are closed, or remain to be closed. Now, the extent of this challenge is unclear and would be different in different parts of the world. An optimistic view is that we have gone over the worst, and normal service is surely but steadily being restored. However, a more realistic view is that the virus, in one way or the other, will be with us for many more months, and possibly years. So the most significant problem here, therefore, is that we do not yet have alternative methods for handling some kinds of court hearings, such as those relating to serious crimes. Because, as you know, serious crimes can surely end up in the deprivation of one's liberty which is something that is treated as being sacrosanct.

The third challenge is, as I said, a perennial one and flows from an alarming and perhaps unpalatable truth, and that is that even in justice systems that we regard as the most advanced, dispute resolution in public courts generally takes too long, costs too much, and the process cannot be understood by anyone except for the lawyers. Lawyers are quite happy with whatever the system is.

Now in the most general terms, we call this 'access to justice' - a problem connected with 'access to justice'. I will deal with it a little later on. We can choose to blame the widespread reduction in public legal funding. We can argue that the current judicial and court machinery is disproportionate in many cases. We can claim that, sometimes, lawyers are the problem because they can inflame disputes. We can regret how little data is available to help us even understand the problem. We can condemn the system for being old-fashioned, arcane and perhaps antiquated. But whatever explanation is preferred, the reality of it is that most people cannot afford to enforce their legal entitlements in our courts.

My dear friends, you can take it from me, globally, the statistics are pretty bleak. I've seen it in the UN. According to the Organization for Economic Cooperation and Development (the OECD), only forty-six percent of the human beings on this planet live under the protection of the law. So, quite frankly, we in the legal community should not be too proud of ourselves. There is much we can be proud of in our law and legal institutions. It should be our industry, our commitment, impartiality, our probity, but we cannot allow vanity to perhaps occlude our view of how distant the courts are from the people.

My dear students, I am not too sure as to whether even the pandemic has sensitized the legal system, that it has to change. If it was to deal with contemporary challenges more efficiently and build back the legal system better, there is a new normal in our courts, as they start hearings across the country with more technology, new rules of operation and large caseloads or case records to get through. The usual scene of the crowded corridors filled with people anxiously waiting for their case to be called, has now been replaced or perhaps will soon be replaced with virtual meeting rooms, or can be replaced with virtual meeting rooms. Large binders, files and bags of court paper are now digital documents in folders and in online filings. But what is not clear is whether this new normal will be a good one, or a harmful one, for the thousands of people who must go to court to deal with criminal cases, a simple bail application, civil cases, matrimonial causes or commercial problems. So, His Lordship will agree with me, as we open up, we will be confronted with an important question and that is to decide if this new version of the justice system will bend more

towards, or farther from, equity and equal access to justice for all.

My dear students, in the past years, our Courts have been engaged with new things. But the pandemic has accelerated the Courts' willingness to adapt to technology that can make the Court more efficient, and possibly to make access to justice and equity more of a priority in the justice system.

Now the Courts' new normal has two other important factors that I want you to appreciate. These are factors beyond the need for social distancing, beyond the need of wearing masks, and beyond the need of the requirement to use remote technology. Firstly, there is likely to be a surge of new lawsuits coming into our courts. Think about it. Growing out of the financial crisis that the pandemic has produced, that must be a foreseeable consequence as people have lost financial security. This is likely to show up in overwhelming records of, perhaps, cases of foreclosures, evictions, money actions, debt recoveries, recoveries of vehicles, mortgage bonds and a complete cocktail of cases that will be filed in our courts.

I say, and I predict, a massive surge. How do the Courts then, I ask the question, intend to deal with this increase? The Courts are then going to need, in my view, new strategies to deal with this increase and to protect the rights of people whose housing, finances, and family life could be seriously compromised by these cases.

My dear students, the other factor is an increasing awareness by the judiciary of the justice system's role in the country's issues of dealing with a pandemic that has compromised their rights. Now, you will remember that, even before the pandemic, one of the common complaints by most litigants was that access to justice was not easy. Now let me explain as to what I mean by access to justice. It is not simply the inability to get adequate legal assistance to deal with legal issues and litigation. It is the sheer frustration of having to go through an unusually long waiting period for justice, and the inevitable financial constraints in the pursuit of justice. Now access to justice, simply, would also include the complaint that the law was not clear. Think about it - how many laws are very clear? The laws are not predictable; they are not consistent in their application. The laws cannot be easily understood. Isn't that so? Is it the case that we write our laws in a way that ordinary people don't understand them? That cannot be the case, isn't it? The laws are of the people, and for the people.

Now this has been further exacerbated by the wake of the recent wave of the pandemic. Now the judiciary, having recognized this phenomenon, are also grappling with their own role in propagating and upholding justice, that facilitates the life of the community. It is heartening to note that the judiciary is also open to change. But, my dear students, the million-dollar question is: what will this newly changed judicial system look like? And more importantly, the question is: will it be harmful to the thousands of people who are at risk of losing their livelihoods, and face financial devastation as they are brought to a court by landlords, banks, financial institutions, debt collectors and corrupt law enforcement officials.

On one level, you will appreciate that technological changes in the new normal are rather exciting. We are all excited with our devices. We are working from home, ostensibly with their promise of reducing the burden of coming to court and defending oneself. Think about it. Through our experience with legal design; globally, universally, and access to justice, we have had many discussions with all the stakeholders for so many years. I'm fairly sure his Lordship does it on a daily basis. Interviewing people, talking to people coming to courts, asking them for feedback on how they deal with their traffic offences, divorces, maintenance applications, custody applications or tenancy problems. Again and again, we have heard just how it is to get there. That's a perennial complaint. The disruption of their homes; they have got to leave their homes, transport themselves to a Court and probably run the risk of their home being ransacked by the time they get back. Transportation to a courthouse, leave from work, days off from work - that has to be arranged. Reluctant employers who do not want to give leave.

A technology-driven system may make it easier, to show up to crucial court hearings, to make obtuse court processes more navigable and easy to manage, and empower more people to take full advantage of their legal protections. However, we must appreciate that there is a substantial risk that this new normal could worsen people's access to the justice system.

Now this might alarm you. Why I say that is, especially if they are on the wrong side of the digital divide. In other words, how many of them have access to digital devices, to the internet, to WiFi, to the infrastructure? In other words, they are on the wrong side of the digital divide. Now, reports have highlighted how some courts are considering digital bail applications of suspects in custody. And all those who haven't managed to make it to their online hearing are faced with the potential of being handed down a default judgement against them. Have we thought about it? How do we deal with it? How do you purge your default? So even when a person does appear at a remote hearing, remote hearings as you know go by quickly and without guidance on how to raise defences, show evidence to get one's story across, and might cause us problems. So we need to cater to those contingencies. Let's leave room for the possibility of a lawyer, for example, who might not be so competent in adapting to a digital environment. Don't bless lawyers with some kind of magic that they probably would not have. A judge too can suffer from the same incapacity. Let's not make a mistake about it. As courts go more technologically based, these early reports of access issues may become more common, especially for people who don't have strong internet connections, video-friendly devices or expertise in online meetings.

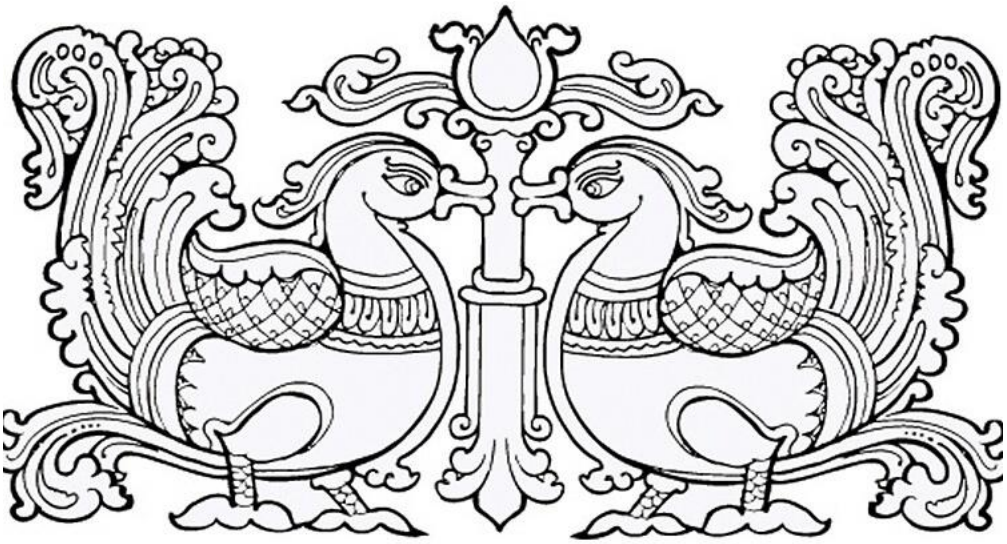
So well-rehearsed, well-resourced, perhaps, repeat players in the Court, like plaintiffs and their lawyers, will quickly become experts in remote hearings and be able to speak more, present evidence correctly, bring witnesses to testify, and get to favourable outcomes. Of course, you know, in international arbitrations today, we have finetuned it to an art and that, perhaps, is an example that we can look at; to study and adopt some of those procedures. Right at the moment there is an arbitration that is going on, where the arbitrators are in three parts of the world and the parties are in two different parts of the world. Now all these crucial legal tasks are hard enough to do in person, and my view is that it may be even more intimidating for a person without a lawyer to do when they are suddenly engaged with an online court hearing. It is therefore important, my dear students, to appreciate that it is now a crucial time for the courts to appreciate that the new normal needs to be defined; not just around efficient technology but around equity and access to justice. Now that means including more diverse communities in defining how these seemingly technocratic decisions of remote hearing procedures are set up. Now these procedural details and design choices have significant effects on the lives of people and financial stability. It is crucial, I say, to experiment with how to design remote courts in ways that are accessible, in ways that are empowering, and in ways that are equitable.

I believe that, to do this, the legal system needs to engage with people beyond the experts and learn from users' experiences and ideas to design a courts system that works not just for the convenience of lawyers and judges, but for anyone who invokes the protection of the law.

My dear students, we must also gather data about the new normal for the courts. In other words, what I mean is for equity and access. Courts and researchers must track whether remote hearings result in more people missing their court dates, losing their cases, or not being able to speak as much as the other party. They should be tracked with attention to different ethnic groups, with people who speak Sinhalese, who speak Tamil, who speak English as their first language and not to forget, people with disabilities.

Now this pandemic, you will appreciate, has forced change upon the courts system that has been resistant for decades. Now is the time, I say, for courts to define a civil justice system that is designed thoughtfully, inclusively and with equity at its centre. I hope I have left you with enough ideas to think about and ponder upon, and I hope you will contribute in no small measure to this legal system and the judiciary in putting in place a system of law - perhaps a hybrid system of law - that would be a good combination of our old system with the new online system.

Thank you.



Technical Sessions

Scales of Natural Justice in a Military Summary Trial: A Critical Analysis with Special Reference to Sri Lanka

KAAN Thilakarathna[1#] and HSD Mendis[2]

[1]*Institute of Human Resource Advancement, University of Colombo, Colombo 07, Sri Lanka*
[2]*Department of Military Law, Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka*

[#]akalanka@ihra.cmb.ac.lk

Abstract - The military is considered as a society of its own with their codes of conduct and rules applying in a different manner from their civilian counterpart. It aims to maintain strict discipline in the military system itself, ready to fight a war when the country is facing a threat. When it comes to the military justice system, it is also built upon the notion of maintaining strict discipline within the military system, where swiftness and efficiency of justice is considered as a paramount concern. The military justice system consists of two main mechanisms which are introduced to achieve this end, which includes a Court Martial and a Summary Trial. While a Court Martial is more of an ordinary mechanism of delivering justice as we find within the civilian society, except for the fact that only persons subjected to military law are brought before them, a Military Summary Trial is something which is unique and distinctive as the commanding officer concern is given a wide variety of power and discretion in conducting and delivering an appropriate judgement in such a trial. By employing a doctrinal approach founded in the qualitative methodology, this research endeavours to critically comment on the applicability of natural justice in conducting such a trial and whether tilting the balance of those scales could be justified within the military justice system. The results revealed that, while the military justice system is both unique and distinct from what you would find in a civilian society, lowering down the scales of natural justice even within a Military Summary Trial cannot be entertained, and therefore, the existing procedures require a revision to maintain the scales of natural justice unstilted at whatever occasion.

Keywords—justice, military law, summary trial

I. INTRODUCTION

The most important characteristic of a military unit is that it is a unit consisting of people who would be on most occasion fighting a war to protect the very existence of a nation. To be effective, and something more than a collection of individuals with weapons, a unit must be commanded. Commanders are responsible for achieving the unit's objective, a function that requires them to ensure that subordinates will do as they are told. This is more than window-dressing; there can be heavy legal consequences for failure to comply. Under the law of war (the body of international law, also known as the law of armed conflict, or international humanitarian law, that among other things defines war crimes), where certain standards are expected of military combatants, it can be seen that, with greater power comes greater responsibility in ensuring that wars are fought according to the rules of combat. The main responsibility for the actions or omissions of the combatants therefore, becomes the immediate responsibility of the commanding officer and hence it is required to have a firm control and grip on the things, specifically, where a commander can in some circumstances be penalized for the misconduct of his subordinates (Fidell, 2016).

Military law as a system of law, being applicable to those who serve in an army fighting to protect the very existence of a nation should be made fit to achieve that purpose. Therefore, Shanor and Houge identifies two broad purposes which are expected of military law. One is to enhance command and control to make a band of fighters into a more effective force; the other is to reduce the exposure of civilian noncombatants to the harsh consequences of war (Shanor & Houge, 2013). In line with these requirements, Military law has evolved to govern a distinct society of warriors whose primary function is fighting or preparing to fight wars. War necessarily involves killing and destroying property, both activities that are legally privileged under international and domestic law. Finer argues that, in a democratic country, the primary function of the armed forces is to fight and win wars (Finer, 1962). Since the environment in which armed forces work in is distinctively different from that of their civilian counterparts, even the administration of justice in

relation to the armed forces must also be separate from the traditional methods of administrating justice. However, that is not to say that, neither the standards nor the scales of justice should be lower to military personnel. While there have been arguments for adhering with a stricter sense of liberalism within the military setting by lowering the scales of justice for people subjected to military law, in the discourse of human rights, such have been neglected and thrown out (Hyman, 1981). For example, in the case of (Hulangamuwa and Others v Balthazar, 1986) it was pointed out that, a man who enlisted as a soldier did not cease to be a citizen and did not forego his civil rights except to the extent expressly covered by the military law.

People who are subject to military law should also enjoy justice as it is enjoyed by their respective civilian counterparts. Justice should embrace fairness and fairness must be for all whether military or not. It is difficult to conceive of an effective armed force, particularly one which is deployed in the furtherance of its government's policy, without a separate system of justice or at least a system which acknowledges the unique nature of military service. Appreciating and understanding the military context is essential to the administration of justice in the military in peace or armed conflict or at home or abroad (Duxbury, 2016). As the military discipline is a *sine qua non* for maintaining a military which is ready to protect its motherland at all cost, the notion of justice as found in the civilian society may sometimes not best suite the requitements of the military. However, this being said, it is also paramount to state the fact that while there is some flexibility which may be legitimized, the military justice system should have its own laws and regulations to control its military personnel, while adhering to the minimum standards of justice and fairness. Therefore, the concept of a fair trial should become a paramount concern in any military proceeding which is undertaken by the military which has an affect on the rights and privileges of the military personnel.

II. RESEARCH PROBLEM

Military justice system is created in such a manner that, while justice must be done, it needs to be done swiftly and efficiently as prolonging with delivery justice may hamper the main military objective of protecting the frontiers of a nation. While this being said, one must not also forget about the fact that, while military personnel belong to a separate class of society, they should not be deprived of the basic and most fundamental of rights granted to their civilian counterparts. Therefore, this paper amis at finding out whether, *there could be any justification for tilting the scales of natural justice in conducting a military summary trial*.

III. RESEARCH QUESTIONS

This paper endeavours to find answesr to the following research questions in particulat.

1) What is the existing law on conducting a military summary trial in Sri Lanka?

2) How the notion of natural justice is utilized in a military suimmary trial?

3) Whether the scales of natural justice be tilted in a military context?

IV. RESEARCH OBJECTIVES

The research objectives of this study are as follows.

1) To explain the the existing law on conducting a military summary trial in Sri Lanka.

2) To critically evaluate the notion of natural justice as utilized in a military suimmary trial.

3) To critically comment on the issue of tilting the scales of natural justice in a military summary trial.

V. RESEARCH METHODOLOGY

This reasreach is conducted using the qualitative methodology where the doctrinal approach is followed. It uses statues, regulations and decided case law as primary sources and books and journal articles written on the subject as secondary sources.

VI. THE MILITARY JUSTICE SYSTEM IN SRI LANKA

The British military justice system, conceived with the aim of 'disciplining' a mercenary force after the 1857 Mutiny, is the progenitor of the military legal systems of the South Asian countries including Sri Lanka. The military justice system in Sri Lanka is for the most part governed by three separate Acts which include, the Army Act No 17 of 1949 (as amended), the Navy Act No 34 of 1950 (as amended) and the Air Force Act No 41 of 1949 (as amended). The main objective of all these Acts is to provide for and the raising of their respective forces. It is to be mentioned that the respective armed forces Acts only apply to people who are subject to military law. According to section 34 of the Army Act No 17 of 1949, a person subject to military law includes, all officers and soldiers of the Regular Force and all such officers and

soldiers of the Regular Reserve, Volunteer Force, or Volunteer Reserve, as are deemed to be officers and soldiers of the Regular Force. In the case of (Hulangamuwa and Others v Balthazar, 1986), the Supreme Court opined that a civil court has restrictions upon itself in applying civilian law to persons who are subject to military law by stressing out that, the complaint made before the Court related to an issue concerning military discipline and was a military matter cognizable by the Military Authorities which had exclusive jurisdiction to deal with the matter and a civil court was precluded from questioning or inquiring into those proceedings.

As mentioned above since military discipline is a *sine qua non* in the whole military system, it becomes a part of the military justice system as well. Unlike in a civilian context the justice system in the military has to be swift and it should also be fair. The success of the military justice system would therefore rest on the balancing of these twin pillars of swiftness and fairness. In the Sri Lankan context, the military justice system contains two main adjudication processes which includes a Summary Trial[1] and a Court Martial[2]. In addition to this, the court of inquiry[3] and board of inquiry[4] functions as fact finding missions where the reports of such bodies and the recommendations therein may be used in latter proceedings such as a Summary Trial or a Court Martial.

VII. NOTION OF A FAIR TRIAL

The basic characteristics of a free society is the unbiased treatment accorded persons accused of crime. It is imperative that the individual be respected in his unique capacity; it is equally necessary that the integrity of society remain above reproach when it turns its enormous force and power to the task of apprehending and convicting criminals. Society can be said to be vindicated when, and only when, a just conviction is reached after all substantive and procedural rights of the accused are honored from the moment of his apprehension, through his detention, to the conduct of his trial in an impartial manner. This notion of justice is also true regarding the military as well. While the military may be considered as a separate unit from the civilian society, still it is a part of the broader fabric of the 'society' which includes both the civilian society and the military society.

When people first spoke of a fair trial, they meant a trial that was roughly "free from blemish," reflecting a meaning of fair that was in use until the nineteenth century. A fair trial might be described as a long trial or a trial in which all evidence was allowed to be heard, or a trial in which a deaf witness was not excluded from giving evidence or an impartial and attentive trial. It was the integrity of the process that delivered a fair trial so that judges spoke of "the fair trial of the action" or "a fair trial of the question which should decide everything between the parties." This "free from blemish" meaning of fair trial became obsolete in the nineteenth and twentieth centuries and was replaced by a new meaning implying "procedural fairness," based on a "check list approach," where questions are asked against a set of rights of a party in the trial A fair trial can be defined as a a trial conducted in all material things in substantial conformity to law (Langford, 2009). Further, in the case of (Goldstein v. United States, 1933), it was held that a fair trial is a trial before an impartial judge, an impartial jury, and in an atmosphere of judicial calm. Being impartial means being indifferent as between the parties. It means that, while the judge may and should direct and control the proceedings, and may exercise his right to comment on the evidence, yet he may not extend his activities so far as to become in effect either an assisting prosecutor or a thirteenth juror.

The notion of a fair trial rests on the twin pillar of listening to both the parties to a dispute and being unbiased, which is often coined under the two Latin maxims of *audi alteram partem* and *nemo judex in causa sua*. These are often referred to as principles of natural justice. They are termed as principles of natural justice due to the fact that, these requirements have been developed by the judiciary in their own sphere of judicial activism so as to ensure a fairness in the procedure which is adopted in hearing a case before them. Even in the absence of a requirement to conduct a fair trial, it has become an absolute necessity to conduct a proceeding in which an accused person is put on trial with the possibility of being convicted and punished.

While it has become somewhat difficult to define what is a fair trial, the idea of a right to a fair trial has found its place in almost all of the major human rights treaties. The idea of a fair trial can be traced back to the Roman Empire in the days of the twelve tables

[1] Part VIII of Army Act No 17 of 1949
[2] Part IX of Army Act No 17 of 1949
[3] Army Court of Inquiry Regulations 1952
[4] Navy (Board of Inquiry) Regulations

and the Magna Carta which in 1215 introduced a right to a jury. Article 10 of the United Nations Declaration of Human Rights declares that, everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 10 does not make any difference as to the status of an individual, that is to say whether the right to a fair trial is only available to a civilian and not to a person who is subjected to military law. Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR) also recognizes a right to a fair trial. Again, it does not distinguish between military personnel subjected to military law and those who are not. Article 6 of the European Convention on Human Rights also recognizes a right to a fair trial, going to the extent in having the right to be provided with the services of an interpreter where an accused has difficulty in understanding the charge made against him (Massey, 2015)

The notion of a fair trial, while being a precarious creature, difficult of being properly defined has found its place as a major fundamental right in all most all of the international treaties, regional treaties and other instruments dealing with human rights. It is included under Chapter III of the 1978 Constitution of the Socialist Republic of Sri Lanka, where Article 13 in general deals with the rights of an accused to have a fair trial. Article 13 (3) declares that, any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court. While the said Article 13 (3) grants the right to any person to have a fair trial, Article 15 (8) of the Constitution specifically provides that, there may be some restrictions placed upon this right, where the accused belongs to the Armed Forces in the interest of national security. Therefore, it can be argued that, the Constitution has itself provided some flexibility in adopting a slightly different set of standards and guidelines when it comes to maintaining the discipline and integrity of the Armed Forces.

VIII. NOTION OF A FAIR TRIAL IN A MILITARY SUMMARY TRIAL

Summary trials are a critical part of the military justice system. They are designed to provide speedy justice where the nature of the offence and the circumstances in which it was committed are best addressed quickly. In Canada the formal purpose of summary proceedings 'is to provide prompt but fair justice in respect of minor service offences and to contribute to the maintenance of military discipline and efficiency in time of peace or armed conflict'[5]. Similarly, Chris Griggs states in the context of New Zealand that 'the purpose of summary trials is to provide commanders with a method of dealing expeditiously and simply with less serious disciplinary infractions, whether they be in New Zealand, at sea or in an overseas operation' (Griggs, 2006). Michael Gilbert puts it even more crisply when he says that 'the summary court-martial is valuable when a military member needs to be taught a swift lesson that will serve as a message to others about to fall off the precipice of good order and discipline (Gilbert, 1996)

According to the provisions of the Military Acts (Army, Navy and Air Force), the commanding officer has a major role to play in maintaining order and discipline within his unit, and therefore is vested with the power of proceeding with a summary trial and deal with certain matters of misconducts by persons who are subjected to military law, to keep the discipline and the integrity of the armed forces. Hence, in explaining the applicability of the standards of a fair trial in a military summary trial, provisions of the Army Act No 17 of 1949 will be utilized as a reference point, since the other two Acts dealing with the Navy and the Air Force are almost identical.

Section 40 (3) of the Army Act provides that, where a Commanding Officer has the power to deal with an accused, where the punishment involved is a minor one in nature, he can ask the accused whether he wishes to be tried summarily or to be tried at a district court martial, and take action accordingly. While it can be argued from the beginning that, the selection is vested with the accused in deciding whether to proceed with a summary trial or to be heard in a district court martial, in practice, the choice made by the accused will often be influenced by the attitude of the commanding officer as deciding to proceed with a district court martial may become costly, since a district court martial has a greater power of punishment which is not enjoyed by a commanding officer sitting at a summary trial. In the case of (Mendis v Commander of the Army, 2001) the Court held that, according to Section 40(1) and 42 of the Army Act it is clear that in the case of a non-

[5] Queen's Regulations and Orders for the Canadian Forces, vol. II, ch. 108, r. 108.2.

warrant officer it is not necessary to hold a formal inquiry under the Army Act or to hold a Court Martial, since there is a clear discretion granted by Statute to hold summary trial and punish a soldier by reverting him to the lower rank. This clearly illustrates the magnitude and the overwhelming power granted to a commanding officer when it comes to taking actions against accused army personnel who are below a certain rank.

Sections 42-44 deals with the procedure that is to be adopted at a summary trial. According to section 42, where a person subjected to military law who is below the rank of a lieutenant-colonel or a warrant officer who has decided to be tried summarily for an offence to which he has become an accused, the commanding officer who gave the option of deciding on whether to deal with the accusation leveled at the accused summarily or through a court martial now has the opportunity of hearing the accusation made against the accused. This does not comply with the broader notion of a fair trial, as there is an obvious possibility of a biasness, since the same commanding officer who brought the charge against the accused is now sitting on judgement over the accused.

Commonsense would be sufficient to point out the problem with such a procedure, whereas the commanding officer would be somewhat compelled to prove and punish the accused, who has been brought before a summary trial by the commanding officer himself. It would be highly unlikely that a commanding officer after framing the charges to be dealt at a summary trial would be less convinced of the guilt of an accused who is to appear before him, where the commanding officer himself has the right and the power to decide upon the guilt of the accused. Since the charge was brought up by the commanding officer himself, there would hardly be any circumstance in which the accused will be released as framing the charge, deciding the charge and giving out the punishment are all handle by the commanding officer. Therefore, summary trials are essentially the sole domain of commanding officers because they act as both prosecutors and judges. This blurring of roles (in which a person is both prosecutor and judge) is normally prohibited in civilian law because it contravenes requirements of fairness and rules against bias.

As the commanding officer plays a dual role of a prosecutor and a judge, it would be impossible think of any unbiasedness. Biasness means an operative prejudice, whether conscious or unconscious, in relation to a party or issue. Such operative prejudice may be the result of a preconceived opinion or a predisposition or a predetermination to decide a case in a particular manner, so much so that it does not leave the mind open (Massey, 2015). Hence it would be clear that, being the prosecutor in a summary trial, the commanding officer would obviously be prejudiced by being the judge who is going to decide on the case, and he would be absolutely be prejudiced by the fact that, if he fails to convict the accused as a judge in which he is also the prosecutor, it would go against his own ego in all most all occasions.

While biasedness is an inherent part of a summary trial where the commanding officer is both the judge and the jury, one has to also inquire into the ability of an accused to be heard before a verdict is pronounced against him. Hence, giving a fair hearing is a must. Thus, one of the objectives in giving a fair hearing is to make sure that an arbitrary decision would not be taken against the accused where his life or property is at jeopardy, before giving such an accused to present his version of the events which made him an accused in the first place. The idea of a fair hearing is coined under the Latin maxim of *audi alteram partem* which requires that a person must be given an opportunity of defending himself. However, this is not just limited to giving the accused a hearing, it must be a fair hearing, which also included rights such as, having legal representation, calling and cross-examining witnesses, having reasons for the decision, knowing of the nature and the extent of the charges made against the accused beforehand and getting an equal opportunity in presenting the case.

Section 42 (a) provides that, the commanding officer conducting the summary trial can even acquit the accused even before hearing the evidence. This certainly is a red light when it comes to the possibility of a fair hearing, as the commanding officer has the power and the ability to dismiss the case without any hearing, wherefore a hearing given to an accused would also not be something similar to a hearing given to a civilian. Summary trial procedure adopted in a military setting does not allow the accused to be represented by a counsel, whereas he is afforded that luxury in a court martial, with the warning that, if convicted, punishments may be much severe as a

court martial has the power to pronounce the death penalty as well.[6]

The accused is allowed to call in witnesses at a summary trial, and the evidences are recorded following the rules of evidence used in an ordinary court of law. However, as the accused is not allowed any legal representation, examining a witness and then to question their credibility when a witness is introduced against him would be left to the accused himself, which is more or less useless since in most cases the accused would lack the required knowledge and skills of a legal practitioner who would have always been a better choice.

IX. CONCLUSION

While it is clear that the notion of a fair trial does not find itself in a military summary trial when compared to a trial in which a civilian is tried, one has to also look at the justification which may be provided in adopting such a stringent procedure. Article 15 (8) it self does allow to deviate form the rights granted under the fundamental rights concerning armed forces, which also includes a deviation from right granted under Article 13 that deals with the right to a fair trial of an accused. While the military justice system is oriented at achieving military discipline by providing swift justice, this swiftness could also bring about harsh outcomes. The only option which is available is not to get rid of the military summary trials by pointing its inability to carry out a fair trial, but by introducing new measures as we find in New Zealand[7], where a summary trial is held before a presiding officer who is not the commanding officer that has brought the charge against the accused armed personnel. The reason being that, while respecting the right to a fair trial of all individuals is important, protecting the nation at the cost of a fair trial is far more important since, without the existence of a country, nothing else would stand in its absence, not even a fair trial.

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AUTHOR BIOGRAPHIES

Mr. K. A. A. N. Thilakarathna currently serves as a Lecturer in Law at the Institute of Human Resource Advancement of the University of Colombo. He obtained his bachelor's degree in law from University of Colombo with Honors and his master's in laws from the General Sir John Kotelawala Defense University with a Merit pass coming at the top of the batch. He was called to the Bar in February of 2018.

Maj H. S. D. Mendis currently serves as the Head of Department, Military Law, Faculty of Law at the General Sir John Kotelawala Defense University. He holds a master's in laws obtained from the General Sir John Kotelawala Defense University in 2020. He was called to the bar in 2008 and possesses significant experience as a legal professional in the field. His research interests include military law, space law, public international law and private law.

[6] Section 49 (2) (b) of the Army Act No 17 of 1949 gives a General Court Martial to pronounce the death penalty

[7] Armed Forces Discipline Amendment Act (No 2) 2007 (NZ) s. 115.

Exploration on Principles of Uniformity, Impartiality and Relevancy Based on the Applicability of Law of Evidence within the Process of Administration of Justice in Sri Lanka

DND Kannangara# and BANM Balachandra

Faculty of Law, General Sir John Kotelawala Defence University, Kandawala Estate, Ratmalana, Sri Lanka

#navo.devindi@gmail.com

Abstract - The system of administration of justice in Sri Lanka remains deeply problematic due to the complexity of issues which arise through the limited incorporation of the principles of uniformity, impartiality and relevance based on law of evidence. Further, it has been observed that the absence of incorporation of the aforementioned principles threaten the independence of judiciary creating room for arbitrary or discretionary judicial decisions. This results in the disappearance of impartiality paving way for biased decisions within the robe of justice. Here, the element of subjectivity hinder the public trust and loyalty towards the system of administration of justice leading the general public to question whether the treatment of judiciary is common for every citizen or not. Though the legal framework emphasizes on the spectrum of natural justice together with the concepts of "Audi Altrem Partem" and "Nemo Judex Causa Sua", the discrepancy between the legal framework and its practical application remains steady. Thus, it is necessary to initiate a dialogue which envisages and explores the complexities of pursuing the system of justice. This research is entirely based on the considerations over the Evidence Ordinance No.14 of 1895 which is the primary legislative enactment which directly addresses the right of considering the existence or the non-existence of facts in issue based on the principle of relevancy. Furthermore, the entire research is blended with slight references towards foreign jurisdictions. Therefore, it is pertinent that the exploration of the incorporation of principles of uniformity, impartiality and relevance based on the applicability of law of evidence within the process of administration of justice is of extreme importance.

Keywords: ***administration of justice, uniformity, impartiality, relevance***

I. INTRODUCTION

In the process of administration of justice, the law of evidence plays a vital role and legal history itself functions as a better evidence which demonstrates numerous approaches of different legal systems and further investigations on relevant approaches highlight how administration of justice functions according to the requirements of uniformity, impartiality and relevance. When focusing on the legal arena of administration of, it is obvious that it depicts the right and fair treatment and this particular concept has been originated through the concept of natural justice. Moreover, justice cannot be administered in absence of its requirements and this article emphasizes how law of evidence provides uniform and comprehensive criteria in regard to the reception of evidence and standards of proof in different categories of actions. Furthermore, the article provides a systematic framework for judicial inquiries reducing the opportunity for arbitrary administration of justice through strengthening the requirements of uniformity, impartiality and relevancy based on the the Second Republic Constitution of 1978, Evidence Ordinance No 14 of 1895, Code of Criminal Procedure Act No. 15 of 1979 of Sri Lanka together with slight reference towards South African, Canadian and United Kingdom jurisdictions basically shedding light on the process of administration of justice with the need of accomplishing the objective of improving Sri Lankan legal framework on system of justice in a wider sense.

II. METHODOLOGY

The discrepancy between legal framework and its practical application was identified as the major research problem embedded within the incorporation of principles of uniformity, impartiality and relevancy. This identification lead to its exploration via black letter approach together with slight reference towards foreign jurisdictions. The Evidence Ordinance No.14 of 1895 which is the primary legislative enactment of the Government of Sri Lanka functions as the basis of the research study. Apart from that the provisions embedded within the Second Republic Constitution of 1978 and Code of

Criminal Procedure Act No. 15 of 1979 will be incorporated within the discussion based on necessity. The qualitative data has been gathered referring scholarly articles, books, reports, statutes and documents. In order to prove the theoretical aspects in a more practical basis, the opinions and judgements of International Academics will be quoted. Additionally, the process of interpretation of data is based on "Grounded theory" which provide explanations for existing law leading to the formulation new rules and regulations enriching the practical application of legal framework advancing the system of justice while providing innovative recommendations. It is pertinent to note that this particular research study also refers to sources of law including decided cases and opinions of jurists which will be cited with the objective of preserving the authenticity and credibility of research.

III. DISCUSSION

The applicability of law of evidence within the system of justice has acquired a vital concern in 21st century due to the complexity of issues which arise within the system of administration of justice. Here, it has been observed that the independence of the judiciary has been challenged due to socio-political interfearences leading to discretionary, baised and subjective decisions and this consists of the adverse effect of loosing the public trust and respect over the system of justice. This study addresses the need of exploration of the principles of uniformity, impartiality and relevancy together with the spectrum of natural justice which directly impacts on the system of administration of justice within Sri Lankan judicial system. Equal protection before the legal system without being subjected to any kind of discrimination based on race, religion, language, cast, sex, political opinion or birth place has already been guaranteed through Artcle 12 of the Second Republic Constitution of 1978ensuring the necessity of strengthening the system of justice. Thus, the equality guaranteed through the Second Republic Constitution of 1978 can be administered through proper adherence to the principles of natural justice which ensure the enthronement of supremacy of law.

A. Need of adherence to the principles of natural justice.

In the process of Administration of Justice, the legal arena of Natural Justice directly relates the process of incorporation of the principles of Uniformity, Impartiality and Relevance. In the past Natural Justice principles applied only to the acts that could be classified as judicial or quasi - judicial. Afterwards, it was expanded up to administrative actions. In the case of *Sarath Nanayakkara v University of Peradeniya* a decision made by the committee was challenged for not giving him a fair hearing. There natural justice principle have been identified relating to a administrative action. But initially Natural Justice principles were under Judiciary and with the passage of time the ambit of application of Natural Justice principle widened in scope. Mainly, it was divided in to two categories as *Audi Alteram Patem* which means listening to both parties and *Nemo Judex Causa Sua* which means the rule against biasness. These two legal concepts functions as the basis of administration of justice based on legal spectrum of natural justice.

In *Audi Alteram Patem* there are certain aspects which are considered as main elements of this rule. One aspect is Right to have notice of the charges and it is pertinent that sufficient time should be given to get ready for the inquiry. Without knowing the charges against a person, he is not entitled to answer such claim and due to that courts follow this procedure at the beginning of the trials. In order to ensure impartiality, both parties should be treated equally. Further consideration on the Right to cross examine witnesses is quite important and this particular aspect can be seen where there is a breach of administrative action. Apart from that, the right to legal representation has attracted a vital attention in the process of administration of justice. However, in the recent history the applicability of these principles has been challenged paving way for a discrepancy between the legal framework and practical application of such legal procedures enacted with the objective of administering justice. Further, whether the existing legal framework is uniform, impartial or relevant has been subjected to vital discussion leading to rethink on the measures which should be adheared to ensure the prevailance of administration of justice within the society.

Furher observations on legal proceedings clearly denotes the right of oral hearing of the adverse parties. Though it isn't mandatory it depends on the circumstancial evidences. In the case of *Thabrew v Yatawara* it was held by Pulle J. "In my opinion, when the petitioner made the request to be heard, he was entitled to a hearing before the order was made against him. In the context under discussion, "hearing" means in my opinion must be an oral hearing by the registrar".

The considerations over the concept of *Nemo Judex Causa Sua* which means "No man shall be the judge of his own case" is directly relevant for assuaring the principle of impartiality with the system of administration of justice. Therefore, any officer or tribunal exercising quasi-judicial powers must be free from biasness. When the judge or the committee has a connection with parties of the case, there exists the of arriving at bias decisions and this clearly highlights the lacuna within the practical application of legal framework leading to the breakdown of the consistency of adhering to the principles of uniformity, impartiality and relevance within the system of justice.

B. Incorporation of principle of Uniformity within the system of justice

The principle of uniformity, deals with the process of administration of justice which should be a uniform process for the commencement of actions in all courts of law despite its existing drawbacks in practical approach. According to Sri Lankan jurisdiction, the process of administration of justice is mainly based on the law of evidence and section 3 of the Evidence Ordinance No 14 of 1895 clearly interprets the terms "court" and "fact". It clearly denotes that "court" includes all judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence. Defining the term "fact" as anything, state of things or relation of things capable of being perceived by the senses ensuring the foundation for the requirement of uniformity addressing the primary issue of people are being punished infront of system of justice based on factual evidence in a wider sense. However, in practicality it has been observed that the delays associated with the system of justice exhausts the litigants' financial resources at well as valuble time due to lack for uniformity within the system of justice leading to brutal consequences threatening the supremacy of law.

Withstanding the principle of uniformity, section 33 of the Evidence Ordinance No 14 of 1895 deals proceeding with issues with regard to former judicial, and the particular section that the evidence given by a witness in a judicial proceeding, or before any person authorized by law for the purpose of proving the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case the court considers unreasonable and this depicts the fact that the purpose should be crucial and it should be given before any person authorized by law, former witnesses should be dead or cannot be found and the admissibility of evidence should satisfy the accepted criteria. In the case of *S.S. Fernando v Queen,* Rose C J stated that "The statement made by witnesses before the magistrate could have been proved at the trial on for the purpose of contradicting him, but the statement itself could not have been used as substantive evidence" Moreover, judgements of courts of justice are considered in case of deciding the requirement of uniformity.

According to section 44 of the Evidence Ordinance No 14 of 1895, the existence of any judgement, order or decree which by law prevents any court from taking cognizable of a suit or holding a trial, is a relevant fact, when the question is whether such court ought to take cognizable of such suit or to hold such trial" The purpose of this doctrine is to prevent multiplicity of actions confirming requirement of uniformity with in the process of administration of justice within Sri Lankan jurisdiction despite its exiting practical drawbacks.

The drawbacks within the pillar of Uniformity within the system of administration of justice in Sri Lanka is well evident from the discreprencies in law related to marriage and divorce of muslims included in Muslim Marriage and Divorce Act No.13 of 1951 restricts the rights and equal protection rendered upon female muslim community within Sri Lanka. As per General Marriage Registration Ordinance No.19 of 1907, both parties of the marriage are required to sign and register the marriage if not it is considered to be invalid. However, as per the Section 17 of the Muslim Marriage and Divorce Act No.13 of 1951 only the bridegroom receives an opportunity to sign at the marriage registration and it clearly denotes the female party even deprived of expressing her legal consent for marriage via signing. This deprivation clearly hints out the lack of uniformity within the system of justice based on gender. Thus, ensuring Uniformity within the system of administration of justice is of vital importance.

Considerations on South African legal arena with regard to the concept of uniformity highlights the fact that there exist provisions with regard to recognition and enforcement of foreign judgments under the common law and it further mentions that Legislation is necessary to indicate that the original cause of action is extinguished and merged with the foreign

judgment, thereby preventing judgment creditors from suing either on the former or the latter at their option. Moreover, for purposes of the common law, a foreign judgment should be defined as 'a judicial determination of a civil or commercial claim, however labelled, in adversarial proceedings. If a foreign judgment conflicts with another judgment between the same parties on the same cause of action, whether given in South Africa or elsewhere, legislation is needed to indicate which judgment should prevail. Comment would be appreciated on whether preference should be given to the earlier or later judgment. If a foreign judgment was given in a foreign currency, which must then be converted into rands, the forum should be given a discretion in determining the date for conversion. Legislation is needed to indicate that South African courts may depart from the common-law rule that the date for converting is the date of payment. This depicts the requirement of uniformity maintained through South African jurisdiction being a country just as Sri Lanka which executes common law leagal framework within the process of administration of justice highlighting the necessity of enthroning rule of law in case of incorporating the principle of Uniformity in rendering justice

C. Incorporation of principle of Impartiality within the system of justice

The requirement of impartiality is one of the most important principles of judicial evidence and this particular principle means that the judge is not prejudiced in his consideration of the case parties to the dispute at the expense of the other party, and this is imposed on him ex officio. Under this principle, the judge is limited to forming his opinion and building his judgment on what the litigants give him.

Furthermore, the evidence in accordance with the law, shall adjudicate in the case brought against him according to what he concluded during his assessment of the evidence submitted and as provided by law. Moreover, Judicial impartiality is recognized as a fundamental component of justice and Judges are expected to be impartial arbitrators and legal disputes should be decided according to the law free from the influence of biasness, prejudice, or political pressure.

When referring to the requirement of impartiality in the process of administration of justice within Sri Lankan jurisdiction, it is evident Ordinance that chapter 12 of the Evidence Ordinance No 14 of 1895 establishes the provisions with regard to the requirement of impartiality through the process of examination of witnesses. According to section 135, the order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively and in the absence of any such law, by the discretion of the court. Moreover, section 136 highlights that judge owns the discretion of admissibility of evidence and section 137 deals with provisions with regard to cross-examination and re-examination of witnesses confirming the importance of the requirement of impartiality in the process of administration of justice and section 149 of the Evidence Ordinance No 14 of 1895 provides that questions cannot be raised in cross examination of witnesses without reasonable grounds and if such a question is raised, section 150 provides the procedure to be followed. It hints out idea that the questions should be raised within the trial only based on facts in issue which means its totally based on the principle of relevancy in order to assure that the particular judgement which will be issued by the court law is impartial. The Evidence Ordinance No 14 of 1895 also assures that court shall forbid any question which is intended to insult or annoyed through section 152 further ensuring the requirement of impartiality. Despite the above legal protection which needs to be incorporated under the rule of law there exists certain discrepencies within the sytem of administration of justice render based on other legislative enactments which directly impact on litigation process.

When refering to criminal justice, it is evident that earlier all trials before the Supreme Court under the provisions of the Criminal Procedure Code Ordinance No. 15 of 1898 were trials held by jury before a judge. And the Trials before the High Court under the Administration of Justice Law No. 44 of 1973 were also held by jury before a judge. Further, non-jury trials before the High Court on indictment was first introduced by the Code of Criminal Procedure Act No. 15 of 1979. Subsequently, the provisions were introduced through the Code of Criminal Procedure (amendment) Act No. 11 of 1988, and such provisions provided the accused with the option of a trial by jury or trial by judge, where the offence was one triable by jury. Nowadays, such jury trials before the High Courts are hardly seen. In the case of *Sumanasena v Attorney General* it was held that observing the demeanour and deportment of witnesses is an important function of a judge. But it is observed that recently, cases go through many judges and

prosecutors before it is finally concluded and due to that the judge, who delivers the verdict has never got the opportunity of observing the demeanour of witnesses. As a result, there can be biased verdicts delivered by the judges. Inorder to prevent this kind of setup a re-introduction of the jury system will be much more effective and would serve the best interest of the criminal justice system preserving the principle of impartiality.

Further, the principle of burden of proof too goes in par with the requirement of impartiality and this can be considered as a rule of cardinal importance where proof of a particular fact constitutes a condition precedent of validity of plaintiff's claim, the plaintiff cannot be considered to have discharged his overall burden, unless the existence of the fact in question is proved by him. In the case *Davoodbhoy v. Farook and others* the plaintiffs admittedly had no right to be declared entitled to the land in question unless they could prove that Jaleel is dead. Since the circumstance of Jaleel's death formed a vital element of the plaintiff's case, it was an inseparable part of the plaintiff's overall burden of proof that they should establish by affirmative evidence that Jaleel's death had taken place. This particular case clearly portrays how the courts admitted the requirement of impartiality in the process of administration of justice. Also, in the case of *King v. Balakariya* it was held that burden of proof doesn't shift to the alleged. Because in the offence of rape one of the ingredients is the aspect of inspite of consent. So, the prosecution is responsible for proving that particular crime has been commiteed by the accused despite the consent of the victim. But, as per the legal proceedings, if the prosecution fails to prove that particular fact the burden will be lifted. Here, the manner of shifting the burden of proof between the both parties appear to be subjective leaving the tendency for impartiality within the treatment of justice.

Further, it is evident that each jurisdiction in Canada has a judicial council that is responsible for promoting and administering professional standards and conduct and based on the Canadian jurisdiction provincially and territorially appointed judges, each province or territory has a judicial council. Its members include judges, lawyers, and members of the general public. Judicial councils develop policies and codes of conduct to provide guidance for judges. Moreover, The Canadian Judicial Council (CJC) is responsible for the federal appointment of judges. It consists of the chief justices and associate chief justices of all of the federal courts and provincial and territorial superior courts while promoting the efficiency, consistency, and quality judicial service within the court system. Here, it is pertinent that the major task of this particular Council was to investigate complaints and allegations of misconduct of federally appointed judges. Further, the CJC has also developed a set of Ethical Principles for Judges and the sole purpose is none other than ensuring independence, integrity, and impartiality in the process of administration of justice. If it finds evidence of serious misconduct, the CJC may recommend to the Minister of Justice that the judge be removed from office. The Minister of Justice may then seek the necessary approval of both the House of Commons and the Senate to have the judge removed from office. The removal processes for provincial or territorial judges vary from jurisdiction to jurisdiction, but are similarly developed to protect judicial independence and ensure that the process of administration of justice along with the requirement of impartiality. Thus, it is important to mention that such developed legal proceedings can be incorporated towards national jusrisdiction inorder to prevent the existing threat towards the independence of judiciary in Sri Lankan domain.

D. Incorporation of principle of Relevancy within the system of justice

The requirement of relevancy in case of administration of justice, under Sri Lankan jurisdiction, it is evident that Chapter 2 of the Evidence Ordinance No 14 of 1895 deals with the "Relevancy of Facts" and furthermore it expresses a logical relation between two or more things; but a fact which is logically relevant may be legally inadmissible in evidence for reasons of policy. Thus, opinion, bad character and similar conduct on other occasions are matters in regard to which evidence, even though it may be logically relevant, cannot be presented in a court of law except in circumstances where these matters are specifically treated as admissible by the provisions of Evidence Ordinance No 14 of 1895.

Furthermore, Sri Lankan jurisdiction consists of a statutory rule which has been enshrined through section 5 of the Evidence ordince which declares that "Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as hereinafter declared to be relevant and of no others." Moreover, an exception is attached to this rule that "This section shall not enable any person to give evidence of a fact which he is disentitled to prove in any provision of the law for the

time being in force relating to civil procedure. In the case *Sodige Singho Appu,* Basnayake C.J. stated that "The Evidence Ordinance No 14 of 1895 lays down strict limits within which evidence may be given in any suit or proceedings. Evidence may be given of the existence or non-existence of every fact in issue and of such other facts as are declared by the ordinance to be relevant and of no others. Evidence admitted in disregard of Section 5 are considered to be evidence that admitted improperly and a conviction is liable to be quashed if such evidence has resulted in a miscarriage of justice."

In the case, *R v Welgamage Mendias* murder case, the defense objected medical evidence on injuries on other persons apart from the deceased. Trial judge held injuries inflicted on other persons also form part of the same transaction which resulted in the death of the deceased. However, on appeal it was held the fact persons other than deceased received injuries are admissible under section 6, but the precise nature and extent of injuries were not so connected with the fact in issue to form part of the same transaction and therefore not admissible under section. Moreover, in the case of *Aronlis Perera*, the court held that the statement made by victim to daughter was not admissible under section 6 and to admit evidence under Section 6 evidence must be Contemporaneous and spontaneous statements and accompanying acts, declarations substantially contemporaneous with the act, the fact or the act could have occurred at different places and at different times and statements of bystander too become relevant under Sri Lankan jurisdiction.

When referring towards the jurisdiction of United Kingdom with regard to the concept of relevancy, it is evident that evidence may be proved through calling witnesses, producing documentary evidence or through producing real evidence. Furthermore, considerations on evidence needed to ensure conviction under UK jurisdiction concerns relevance, admissibility and weight and it further depicts that Evidence of whatever type must be both relevant and admissible. Evidence is relevant if it logically goes to proving or disproving some fact at issue in the prosecution. It is admissible if it relates to the facts in issue, or to circumstances that make those facts probable or improbable, and has been properly obtained. The prosecution is only required to introduce evidence that proves each element of the offence. For example, for an absolute offence, it is not necessary to introduce evidence as to the defendant's state of mind. This would be irrelevant and inadmissible. The "weight" of the evidence is the reliance that can properly be placed on it by the court.

The above comparative analysis highlights those current legislative enactments require improvement which means some specific provisons included even within the Evidence Ordinance No 14 of 1895. For example, Section 5 which would sometimes adversely affect the principle of impartiality through limitting the scope of providing evidences required for acquitting the exact criminal can be identified as a consequence which emerge from the exclusion of hearsay evidence within the system of justice leading to disfuntioning of principle of relevancy.

IV. CONCLUSION

The research proved that the Evidence Ordinance of Sri Lanka has provided a strong foundation for the process of administering justice despite its ambiguity in certain circumstances. The instances of socio-political interfearances on the system of justice need to be regulated and the research reveals the fact that it is necessary to pay vital concern over exploration of the principles of uniformity, impartiality and relevancy in the process of improving the legal spectrum of Administration of Justice. Thus, it is evident that the system of administration of justice should be strengthened and it is pertinent to ensure the independence of the judiciary confirming justice and fair treatment in front of law for every individual.

V. RECOMMENDATIONS

It is necessary totake strong legal measures to avoid illicit socio-political interfearances for the system of administration of justice.

It is necessary to reduce the ambiguousness of the rules and regulations provided in the Evidence Ordinance No 14 of 1895 leaving no room to safeguard the offenders through the robe of justice.

Legal professionals should assure the proper application of rule of law within the system of administration of justice.

It is necessary to implement an action plan on eliminating the undue delay within litigation process inorder to achieve uniformity, impartiality and relevancy within the system of justice.

The government should restore administration of justice while restoring the faith in judiciary through enthroning Supremacy of law.

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AUTHOR BIOGRAPHIES

The author is a graduate of law at General Sir John Kotelawala Defense University and a final year undergraduate of Department of English and Linguistics of University of Sri Jayewardenepura. She holds membership in many local and International Associations. This is her second experience in research publication. Her special and interested areas are Labour Law, Law of Evidence, Criminal Law, Human Rights Law and International Humanitarian Law.

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Freedom of Expression in Cyber Space: Protecting Right to Privacy and Public Security in Sri Lanka

M Gunathilake

Sri Lanka Law College

madara.gunatilaka@gmail.com

Abstract - Cyber space has become the most prevalent medium to express ideas in this digital age. Freedom of expression is guaranteed and secured under the Sri Lankan Constitution as a fundamental right. Right to privacy and public security are conflicting with freedom of expression in most instances. Considering online media, this conflict is severe due to the unlimited opportunities available for public to express what they feel and share it throughout the world within a short time frame. Right to privacy has not been given sufficient attention under the Sri Lankan law whereas no specific definition provided for the term "privacy". Public security legislations contain vague terms which act as inappropriate to address the issues which connected with security of the state. In some occasions freedom of expression violates the individual privacy due to the less protection awarded to privacy rights. Public security laws are conflicting with liberty to express ideas in cyber space in most occasions where the government has to take immediate steps by strictly limiting freedom to express ideas. Right to privacy should be guaranteed as a fundamental right in Sri Lanka. Public security laws should be reasonable and special legal rules should be established to the protection of public security from the threats emerging from cyber space. This study attempts to discuss how to balance the conflict between expression, privacy and public security in cyber space as appropriate to Sri Lanka.

Keywords— freedom of expression, privacy, public security

I. INTRODUCTION

The Constitution of the Democratic Socialist Republic of Sri Lanka guaranteed the "freedom of speech and expression including publication as a fundamental right in its Article 14 subjected to several restrictions. Cyber space has become an essential platform in this 21st century, opening millions of opportunities for people to express their opinions and share it throughout the world instantly. Even though the Sri Lankan legal system provides strong protection for freedom of expression, the privacy rights and law relating to public security are granted lack of attention in order to address the novel issues arising due to online freedom of expression. The legal provisions available on right to privacy and public security are not sufficient to answer the issues emerging with the new developments in cyber space. Freedom of expression (FOE) is secured as a fundamental right (FR) in Sri Lanka (SL), including expression in online media while privacy rights and law relating to public security do not have sufficient protection under Sri Lankan law. This research will focus on the situations where online freedom of expression restricts the right to privacy and public security in SL while attempting to provide recommendations to overcome these situations through legal reforms for balancing the conflict among these rights.

II. METHODOLOGY

'Black letter approach' and 'empirical data analysis' are the main methodologies used in this study. The black letter approach applied to evaluate the existing legal provisions in SL and concepts related to the area of the research. The constitutional provisions related to freedom of expression, privacy and public security are examined. The method of empirical analysis is followed to examine and analyze the identified legal provisions with the intention of examining the adequacy of these provisions in order to address the practical issues in online media.

A. Data Collection

1) Qualitative and Quantitative Data: Since this study is a library research, primary attention in data gathering is given to collect qualitative data. Legal provisions included in the constitution, Acts and ordinances, case law, international conventions and declarations were followed under data gathering in order to find out the governing law in the research area. Gathered legal provisions are separated into

several areas for the purpose of comparing those with each other. Finding out the conflicts in existing legal provisions in the research area is conducted by applying them into the practical issues in the society.

2) Primary and Secondary Data: This research is based on the data gathered using primary and secondary sources. As primary sources Constitutional provisions, statutes, Acts, case laws are mainly referred under SL context. For the purpose of discussing public security laws, several regulations are taken into consideration. International legal provisions such as conventions are analyzed for providing recommendations.

3) Data Collection System: Books, articles in printed journals are used to gather legal provisions and criticisms on the research area. Online websites, journals and publications are referred in this research. In order to gather practical issues, online and offline newspapers, news websites are used. Attending to seminars and forums conducted under legal institutions also used under data collection.

III. RESULTS AND DISCUSSION

A. The Existing Legal Framework in Sri Lanka

1)The legal background of freedom of expression in cyber space: "Freedom of speech and expression including publication" is protected under Article 14(1) (a) of the Sri Lankan Constitution as FR, and "shall be respected, secured and advanced by all the organs of the government and shall not be abridged, restricted or denied" as specified in the Article 4(d) of the Constitution. FOE secured by Article 14(1) (a) is restricted by provisions of Article 15 of the constitution itself. Under Article 15(2) it stated that FOE may be limited by the boundaries prescribed by law "racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence". Article 15(7) stated that even though freedom of expression has given a large scope to operate, it is "subjected to such restrictions as may be prescribed by the law in the interest of national security, public order and the protection of public health or morality, or the purpose of securing due recognition and respect for the rights and freedoms of others or of meeting the just requirement of general welfare of a democratic society".

The term 'law' stands for "regulations made under the law for protecting public security" as per the Article 16 of the constitution. It upholds the validity and effectiveness of "all existing written and unwritten law notwithstanding any inconsistency with the fundamental rights chapter of the constitution" weakening the protection provided by the constitution towards fundamental rights and as well as to the constitutional supremacy.

Cyber space is becoming a popular instrument in speech, expression and publication. The prevailing legal protection in Article 14 (1) (a) of the constitution should cover speech, expression and publication in the cyber space in order to grant validity to that provision. Even though the legal framework on privacy rights and public security has the objective to be safeguarded by limiting FOE, there is a lacuna of provisions which specifically targeted online FOE. Moreover, the protection afforded in Article 14(1) (a) is limited to SL citizens as it doesn't apply to all persons.

The constitutional guarantee for the freedom of expressions or for the restrictions upon them are not consistent with international standards and is unable to address the desires expected by International Covenant on Civil and Political Rights (ICCPR). For an example, in ICCPR Article 19 contains "a right to hold opinion without interference, to receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of a person's choice". In Sri Lanka, the constitutional provisions do not have any direct obligation that limitations upon constitutional provisions should be "reasonable" or "necessary" as decided in *Malagoda v AG* (1982) 2 SLR 777 *as l*acking of 'reasonableness' and 'necessity' cause absurd results in online freedom of expression.

2) Privacy Laws v Freedom of Expression in Cyber Space: "Right to privacy" is not expressly recognized in the SL constitution and also there are no express legislations that is initial for protecting right to privacy. There is no exact definition provided for "privacy" under Sri Lankan law. "Right to privacy" has recognized by SL courts under the application of roman dutch law and common law in specific situations. Oxford Dictionary defined "privacy" as "confidential: not to be disclosed to others/ kept or removed from the public knowledge or observation" (Soyza, 2017). According to Westin (1968) , privacy is "the desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitudes and their behavior to the

others". The scope of the privacy should be determined carefully according to the society because the same material can be treated as private by one community, whereas it become public to another. The importance of the term privacy is not felt until the cyber space emerged as a threat to it mainly through social media.

Internet and other technologies of information & communication have increased the possibility of information or data being placed in the hands of unintended parties (Marsoof, 2008). Several legislations indirectly attempts to provide safeguard to cyber space users against surveillance and other forms of cyber threats. Even though right of privacy is not protected expressly in the constitution individuals can claim compensation under law of defamation. Criminal defamation has been repealed in Sri Lanka in the 2002, therefore the only remedy available for a defamation can be found under the civil law. In the decided case of *Hewamanne v Manik de Silva* (1983) 1 SLR 1 upholds the view that constitutional provisions for freedom of expression will not restrict the operation of law of contempt even though it included as a fundamental right.

There is no any exact legislation that provide adequate protection for privacy of an individual in Sri Lanka, but *Computer Crimes Act No.27 of 2007* has certain provisions related to privacy and personnel information. Under the Computer Crimes Act any person who had unauthorized access to a network or computer , modifies a computer network unlawfully, deals with data without lawful authority, unlawful discloser of information and committed any offence under that against the national security will be subjected to penalties. *Information and Communication Technology Act No 27 of 2003* establishes Information and Communication Technology Agency which has the main obligation to implement a national policy with regard to the information and communication standards in Sri Lanka. *Electronic Transactions Act No 19 of 2006* also contains provisions for the protection of privacy of consumers. *Parliament (Powers and Privileges) Act No.21 of 1953* as amended permits to penalize any defamatory statement about any parliament member relating to their conduct as a parliament member including activities and speeches or declarations made by them within the capacity as a parliament member. Section 15(1) (a) and (d) of the Sri Lanka Press Council Law No.5 of 1973 disallows publication of any materials which contain obscenity and profanity. Under *Obscene Publication Ordinance No.22 of 1983*, Section 268B and 268 C of the *Penal Code (Amendment Act No.16 of 2006) & Electronic Transaction Act No.19 of 2006* recognizes a publication of any material of obscene in electronic medium as a criminal offence.

3) Public Security v Freedom of Expression in Cyber Space: National security laws in SL can be categorized into two main areas; general laws and emergency regulations. In ordinary circumstances the general laws are prevailing until revoked by emergency regulations which only appear in the state of emergencies. Under Article 76(2) and 155 of the Constitution it declares the "powers of the president to make emergency regulations and empower the parliament to enact any laws relating to public security". Emergency Regulations are coming into force under the provisions of *Public Security Ordinance No.25 of 1947* (PSO) empowering the president to make emergency regulations in the state of emergency for the safeguard of public security. Section 2 PSO states, a state of emergency can only be declared by the discretion of the president in special occasions "where the interest of the public security, protection of the public order, maintenance of supplies and services which are essential to the life of the community are under threat". There are no exact offences prescribed but under the emergency regulations, the president can include the offences and punishments. The discretion afforded to the President upon declaring a state of emergency is required the need of life of the nation to be under threat which is consistent with international standards as Walikala (2008) explains.

During a state of emergency, the president has the discretion to make emergency regulations which he considers "necessary, expedient or in the interest of the general public in protecting public security, preservation of public order, suppression of mutiny, riot or civil commotion or for the maintenance of supplies and services essential for the life of the general community" under Section 5(1) of PSO. Emergency Regulations holds the power of "over-riding or amending the operation of any law apart from constitutional provisions" as per Section 7 of PSO but under Article 15(2) of the Constitution, it specifically declares that emergency regulations act as a restriction upon several constitutional provisions including Article 14(1) (a) in favour of religious and racial harmony, contempt of court, parliamentary privilege and defamation.

Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA) provide restrictions upon freedom of expression, granting wide powers to the police to search and arrest & keep the suspects in detention. Any person "causes or intended to cause an action of violence by words either spoken or intended to be read, by signs or by visible representations which create any threat to religious, communal or racial harmony or create ill-will among different communities, racial or religious groups will be liable for an offence" under Section 2(1)(h). It is an offence to print/ publish any materials connecting to the commission and investigation of and offence under Section 14(2) of PTA in a newspaper without the approval of the responsible authority which can generate above discussed situations within the community. Section 118 of the Penal Code (PC) of Sri Lanka declared that "whoever contempt the president using insulting or disparaging words whether spoken or intended to be read or by signs or visible representations shall be punishable with simple imprisonment and subjected to a fine" whereas Section 120 makes it an offence that excite or attempt to excite their feelings of dissatisfaction towards the government, inciting hatred or contempt towards the administrative of justice, raising discontent or dissatisfaction among citizens.

The Profane Publication Act No.41 of 1958 defines "Profane Publication" as "publication of any book, newspaper, picture, film or other visible representation containing any insult to the originator of any religion, any deity, saint or any individual venerated by the followers of any religion or any religious belief or any representation that ridicules any figure, picture, emblem, device or other thing associated with or sacred to the following of any religion" under Section 5. It is an offence "to write, produce, print, publish, sell, distribute or exhibit any profane publication by any writer, publisher, printer or distributor" while fair comment and fair criticism is available as a defense under Section 2.

Section 15(1)(a)(d) of the *Sri Lanka Press Council Law No.5 of 1973* controls the press prohibiting the publication of materials comprising obscenity and profanity as it disallows the publication of official secrets including any information relating to military or police which can be or likely to be injurious to the public security in the country under section 16. *The Official Secrets Act No.32 of 1995* defines "official secrets" in it's section 27(1) in an extensive nature: containing any information concerning military or any part of that including any material relating to military forces of the country directly or indirectly.

B. Conflict of Privacy v Freedom to Express in Cyber Space

Primary intention of the law is to maintain democracy and also decency of the country. Mere recognition of privacy as a right will not provide justice. The changes brought by 19th amendment to the constitution on Article 14(1) (a) attempts to provide protection to right to privacy, but it's not sufficient. The introduction of Right to Information as a FR can act as a restriction to right to privacy when the public interest is higher than protecting individual privacy. Under Section 18 of the *Computer Crimes Act*, it grants power to a police officer or an expert during investigations "to obtain any subscriber information or traffic date from a service provider" and it can cause violation of privacy rights as it can permit to obtain the private call details. This option can be used against protection on right to privacy due to lack of recognition provided in SL context.

Its popular nowadays to use online medium for insulting or humiliating another one. Most of the victims are famous characters in the country. This issue is common to the world and each government should establish mechanisms to track down these offenders and punish them. Under law of defamation we can find a remedy to that, but tracking the unknown offenders who have published those in social media and the web is weakening the process. 'Public humiliation' is not considered as a serious offence under cyber law and lack of code of ethics to govern this area can cause violation of individual privacy by FOE. Even though the institutions like Sri Lanka Computer Emergency Readiness Team (CERT) attempts to safeguard people from potential attacks in cyber security matters, inadequacy of law related to privacy rights weakening the process. There is no specific penalty to the offenders even if they get caught under the law against public humiliation. Dual victimization of the victims can occur due to unrestricted FOE over their privacy rights.

Defaming people through online media is the modern method of destroying the reputation of a person as not like in offline media, there are several resources such as social media sites, facebook live, blogs, websites etc. and it can be spread all over the world within a second. Absence of "criminal defamation" to punish the offenders in this context is felt as a

weakness as reputation has paramount importance to a person. Defamation is a serious injury to a person, therefore providing compensation is not sufficient rather than imposing penalties. In news reporting, some online websites and gossip channels provide threats to individual privacy using their FOE by publishing sensitive information and fake news. Facebook commenting option and facebook live option is also using rapidly against privacy rights. Under civil defamation publication for "national interest" is not an accepted defense and it doesn't need intention or knowledge of the harm, but solely compensating for a serious injury will not fulfill justice as the offenders have to undergone a huge psychological trauma. Protecting individual privacy can be difficult in this digital age, but not providing sufficient protection to right to privacy will cause absurd results.

C. Conflict of Freedom of Expression v Public Security

When it comes to the conflict between freedom of expression as a fundamental rights and power of emergency regulations, courts tend to make favourable approach towards the state, upholding the national security over the cost of constitutionally protected rights. This view was questioned in the case of *Joshep Perera v AG* (1992) 1 SLR 199 and it was decided that restrictions on rights declared by the Constitution must be 'reasonable and necessary' and should be implemented only for acquiring the necessary objectives where it is essential. Emergency Regulations, PTA provisions and other national security laws have been subjected to criticisms upon their inadequate connection with the objectives of those provisions and over comprehensive nature. Still the courts in Sri Lanka do not provide a strong opinion on how these provisions are applicable in online medium. Legislations on national security have some common issues such as unclear nature of the scope, linking with the matters that are not sufficiently related to national security and imposing strict penalties.

The government is monitoring the activities of facebook users such as incidents of insulting individuals and spreading untrue statements criticizing the government using the service of special teams under Telecommunication Regulatory Commission of Sri Lanka (Kuruwita, 2010). Access to social media including facebook is a right as a part of freedom of expression, therefore blocking websites and social media with the intervention of government can act as a restriction to the free enjoyment of these rights and will decrease the reputation of the country.

In *Amaratunge v Srimal (1993) 1 SLR 264* it was decided that every citizen has a right to criticize or compliment the government or its agendas according to their political views as FOE is secured as a FR in Sri Lanka. Expression of the ideas cannot be limited to offline methods in this 21st century, so there should be an opportunity for general public to express their ideas through any medium. Banning and blocking access to websites or to social media will restrict the free enjoyment of those constitutionally protected rights. The government of SL blocked the access of the "Tamilnet.com" website from June, 2007 during the last part of the war as it stands for the Liberation Tigers of Tamil Eelam (LTTE) and it can be justified as it's a necessary step againt terrorism. Moreover, the websites such as 'TamilCanadian.com', 'Nidahasa.com' and 'Lankaenews.com' were blocked by the government for the protection of national security of Sri Lanka (David, 2010). As BBC (2010) reported, where the presidential elections are taking place, the government block websites including news sites as occurred in 2010.

Millenium City Scandal occurred in 2002 can set as a popular example for the conflict of FOE and public security which resulted the exposure of identities of the officials of covert operation unit of SL forces due to widespread media coverage ended as a tragedy. Most recent example for the conflict of public security and FOE in online media is the anti-Muslim struggle which was occured in March 2019, which made serious damages to the people and to their property adding a black mark to the country in international stage. Government has to block the access to social media and other forms of communication such as Viber and Whatsapp in order to control the situation. It was revealed that some of these groups responsible for conflict are organized through social media reminding the necessity of enacting strong legal provisions which can address these issues.

IV. CONCLUSION AND RECOMMENDATIONS

Balancing the conflict between freedom of expression, privacy and public security in online media is a common sinario faced globally. As far as expression in cyber space protects essential rights of individuals including privacy and security, implementing harsh limitations would provide injustice. Reasonableness and necessity should

include as the base of restrictions upon Article 14(1) (a) of the Constitution. The narrow scope of the Article 14(1) (a) must be altered as like in ICCPR provisions.

Right to privacy should be included as a fundamental right or it must directly link with an existing fundamental right like in India. Sri Lanka as a country upholding the concept of democracy should consider more on implementing a privacy law regime in both online and offline modes. The term privacy should be defined according to the culture and social beliefs of the people in SL as to provide at least a minimum protection. This study suggests the need of granting a constitutional guarantee to right to privacy in this technological era. It's absurd that freedom to express ideas has given wide protection while the right to privacy has not given valuable consideration whereas one right can easily abuse another in that context. The conflict between privacy and expression can be minimized through recognizing both rights in same weight as it will automatically draw the limitations upon those rights. Hate speech and humiliation should have addressed under the legal provisions, as the law of civil defamation alone is insufficient to address these issues. Criminal defamation should available even only for serious instances which causes pscycological trauma to victims. Providing monitary compensation for a severe damage to reputation or the enjoyment of privacy would not provide justice.

Obligations of the service providers and authorities who monitor the cyber networks must be increased in order to balance the conflict between privacy and security with expression. News websites must have stronger ethics regarding the limitations upon to what context they have freedom to express and publish the news items without violating the privacy rights and public security by implementing a regulatory mechanism like CERT with the involevement of the government. Cyber defamation should have given a special recognition to address hate speech and humiliation to a necessary extent in order to control it without restricting freedom to express opinions. Penal code should undergo necessary amendments like the amendment made in 1995 in order to address emerging problems through internet. *Computer Crimes Act* should address the new threats such as cyber humiliation and hate speech. Rights granted through traditional offline methods should be applicable in online methods (Davies, 2015) by modifying the legal provisions.

Considering serious issues related to security of the general public, protecting their other rights may be problematic. Every incident which can be possibly occur should be answered with its own merits. Sri Lanka as a developing country should focus more on identifying the threats emerging with technological development and should take necessary measures to prevent them. In Australia, the government use to promote web filters to get rid of unauthorized materials. Websites which act in offensive nature to the monarchy have been banned by the governments in order to protect public security and several other states practice the same policy by blocking the access to unauthorized websites. Some jurisdictions like Russia and China practice a different method by having more power into the hands of the government in determining the websites which can be acceptable within the country and banning all others. International standards and effective legal mechanisms used in foreign jurisdictions must take into consideration when conducting legal reforms.

Law should act as a weapon which guards the rights and security of the individuals whereas law should shield the society from victimization of negative effects of technological development. The main intention of the legislature of including rights is to provide liberty and freedom to people, therefore to achieve those objectives, conflicting rights should be addressed in sensitive manner.

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ABBREVIATIONS AND SPECIFIC SYMBOLS

International Covenant on Civil and Political Rights (ICCPR)

Freedom of expression (FOE)

Fundamental Right (FR)

Sri Lanka (SL)

Sri Lanka Computer Emergency Readiness Team (CERT)

Penal Code (PC)

Public Security Ordinance No.25 of 1947 (PSO)

Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA)

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Madara Gunathilake is a LL.B graduate with Second Class Lower Devision. She had completed her bachelor's degree from General Sir John Kotelawala Defence University. She is currently reading for the Attorney-at-law final year examination at Sri Lanka Law College. She has completed her internship under President Counsel U.R. De Silva by joining his chambers.

Criminal Proceedings of Drunk Driving Cases in Sri Lanka: An Analysis of Law and Practice

KC Munasinghe

Sudath Perera Associates, Nawala, Sri Lanka

kasunchamaramunasinghe@gmail.com

Abstract - It is reported that, in Sri Lanka, there are almost 8000 road accidents take place per year and out of them a considerable number of accidents are occurred due to drunk driving. There are many rules and regulations presented as to how charges to be framed and the procedure of breathalyser tests shall be carried etc. in relation to drunk driving cases in Sri Lanka. Consequently, every person in the country reached into the attitude that the judicial system has failed to administration of justice over the parties of the drunk driving cases. This study follows the qualitative approach while analysing the existing legislative enactments, regulations, and case laws with the objective of evaluating the substantive and procedural aspects of the Sri Lankan legal framework relating to drunk driving, while inviting relevant stakeholders to revisit their approach towards drunk driving cases.

Keywords— drunk driving, Breathalyzer test, criminal charges, penalties, admission of guilt

I. INTRODUCTION

It is common fact to observe that, many drunk driving cases are being taken up and fines are being imposed against the persons who plead guilty for violating motor traffic law daily in the court houses in Sri Lanka (Wickramaisnghe, 2021) Yet, it is an exception to see an instance where an accused defending himself in a trial by pleading not guilty for such charge. This happens due to various reasons including, to get the case concluded on the very first day, therein, the accused shall not need to spend more time with the litigation and/or due to lack of knowledge on the defenses available to an accused in motor traffic law. Consequently, most of the Attorneys do not focus much on drunk driving law in Sri Lanka other than the penalties stipulated in law. Therefore, the study intends to articulate law relating to drunk driving and breathalyzer test, having the objective of evaluating the substantive and procedural aspects of the domestic legal framework relating to drunk driving.

II. THE MOTOR TRAFFIC ACT

The Motor Traffic Act, No. 14 of 1951, (hereinafter referred to as "MTA") which shall be read with the Increase of Fines Act, No. 12 of 2005, MTA (Amendment) Acts, Nos. 31 of 1979, 40 of 1984 and 10 of 2019, contains the law relating to drunk driving.

Further, according to the MTA, there are instances where the police frame charges including the offences stipulated in the Penal Code and Offences committed under the influence of Liquor Act, No. 41 of 1979, (hereinafter referred to as OCILA) which shall be referred with the Increase of Fines Act, No. 12 of 2005.

MTA was introduced in relation to motor vehicles and their use on roads, having the objective to regulate the provision of passenger carriage services and the carriage of goods by motor vehicles, and to provide for the regulation of traffic on roads and for other matters connected with or incidental to the matters aforesaid.

MTA (1951) stipulates that "no person shall drive a motor vehicle on a road after he has consumed alcohol or any drug". It is fascinating to note that, this section was amended by the MT (Amendment) Act, No. 31 0f 1979, and from that, the original section was repealed and substituted the aforementioned section. The section 151 (1) before the amendment was "No person shall drive a motor vehicle on a highway when he is under the influence of liquor."

The main difference was that the legislature removed the underlined part of the original section and incorporated new wording as "no person shall drive a motor vehicle on a road after he has consumed alcohol or any drug."

Offence mentioned in the section 151 (1) further extend as (1A) and (1B). These sections shall be read with sections 214, 215, 216, 216 (A) and 216 (B) as they relate according to the facts of the case.

Where, any person who contravenes any provision of this MTA or any regulation, or fails to comply with any order, direction, demand, requirement or notice lawfully issued, made or given (under any provision of MTA or any regulation) shall be guilty of an offense under MTA. Further, attempting to commit, or abetting the commission of, an offence shall have been recognized as offences under MTA.

The suspect/accused shall be trialed in the Magistrate court as a summary trial and if he is proven to be guilty, wrongdoer will be liable to a fine not less than twenty-five thousand rupees and not exceeding thirty thousand rupees or to imprisonment of either description for a term not exceeding three months or to both such fine and imprisonment and to the suspension of his driving license for a period not exceeding twelve months.

Further punishments are stipulated under the sections 216 (a) and (b) as the read with Section (1A) and (1B) of 151 of MTA.

According to Section 216 (a), "any person who is guilty of the offence of contravening Section 151 (1A) shall, on conviction after summary trial before a Magistrate, be liable to a fine not less than twenty-five thousand rupees and not exceeding thirty thousand rupees or to imprisonment of either description for a term not exceeding six months or to both such fine and imprisonment and the cancellation of his driving license"

Section 216 (b) states that, "any person who is guilty of the offence of contravening the provision (1B) of section 151 shall, on conviction after summary trial before a Magistrate, be liable:

(a) where he causes death to any person, to a fine not less than one hundred thousand rupees and not exceeding one hundred and fifty thousand rupees or to imprisonment of either description for a term not less than two years and not exceeding ten years or to both such fine and imprisonment and to the cancellation of the driving license;

(b) where he causes –

(i) hurt to any person, to a fine not less than thirty thousand rupees and not exceeding fifty thousand rupees or to imprisonment of either description for a term not exceeding one year or to both such fine and imprisonment and to the cancellation of his driving license; or

(ii) grievous injury to any person, to a fine not less than fifty thousand rupees and not exceeding one hundred thousand rupees or to imprisonment of either description for a term not exceeding five years or to both such fine and imprisonment and to the cancellation of his driving license" (Sri Lanka No. 14 of 1951).

According to section (1) (cc) of the 151 of the MT Act, a police officer can arrest any person without a warrant if he has reasonable grounds to believe that such person has committed an offence under this section.

Furthermore, subsections (a) and (c) of 1 (c) of section 151 stipulates that, where a police officer suspects that the driver of a motor vehicle on a road has consumed alcohol or drug, he may require such person to submit himself immediately to a breath test for alcohol or an examination by a Government medical officer in order to ascertain whether such person has consumed alcohol and that person shall thereafter comply with any such requirement as the case may be.

Under the same subsection (b and d), if the suspect refuses to face for any such examination, law permits the court to presume that he has consumed alcohol or drugs unless, evidence to the contrary is presented, and the report of the government medical officer constitutes sufficient evidence that such person had consumed liquor or drug, unless contrary is proven.

III. OCILA AND THE PENAL CODE

At times, it can be observed in courts that, Police officers use offences stipulated in the OCIL Act and the Penal Code together, at the instance where framing charges on drunk driving depending on the facts of the particular cases.

In such situations, section 2 of the OCIL Act, section 2 shall be read together with section 12 (2) and section 3. According to section 2, "Any person who, being under the influence of liquor, in any public place or any place where it is trespass for him to enter and there conduct himself in such a manner as to cause annoyance to any person shall be guilty of an offence".

Further in reference to the above-mentioned section 12 (2), it states, "Every person guilty of an offence under section 2 or 4 of this Act shall on conviction after trial be liable to a fine not less than one thousand five hundred rupees and not exceeding three thousand five hundred rupees or to imprisonment of either description for term of not less than one year and not exceeding two years

notwithstanding that such fine or imprisonment is excess of the original jurisdiction of such Court".

Moreover, if any person has caused any damage to a public property, the police can raise a charge against such accused by utilizing section 3 of the OCIL Act where it states that, "Any person who, being under the influence of liquor, causes damage to public property shall be guilty of an offence shall be liable upon conviction to be punished with imprisonment of either description for a term of not less than six months and not exceeding two years and shall also be liable to a fine not less that one thousand five hundred and not exceeding five thousand rupees".

Similarly, it is common practice of the Police to refer to the following offences prescribed in the Penal Code (1889) in drunk driving cases depending on the facts of the cases.

For istance, section 298 states of the Penal Code (1889) that, "Whoever causes death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished shall be punished with imprisonment of either description for a term which may extend to five years or with fine or with both" Thus, this section will be employed in the event someone is accused of causing death by negligence.

Further, in an instances where the aggrieved party had been injured, the police will refer to Section 317 which states sets out the punishment for voluntarily causing hurt; "Whoever, except in the case provided for by section 325, voluntarily causes hurt shall be punished with imprisonment of either description for a term which may extended to one year or with fine which may extend to one thousand rupees or with both"

Police would also avail Section 316, which provides for the punishment for voluntarily causing grievous hurt in cases where there are any fatal injuries. That section states, "whoever, except in the case provided for by section 326, voluntarily causes grievous hurt shall be punished with imprisonment of either description for a term which may extended to seven years and shall also be liable to a fine"

IV. REGULATIONS AND IGP ORDERS

MTA enabled the regulations to be made the manner in which breath tests should be taken, the concentration of alcohol in a person's blood at or above which a person should be deemed to have consumed alcohol or any drug, mode and manner in which such examination should be conducted on a driver.

Accordingly, the way procedure of the breathalyzer test shall be conducted is stipulated in the Motor Traffic (Alcohol and Drugs) Regulations (1979) (hereinafter referred to as "1979 regulations"), Extra ordinary gazette No. 708/18 referred to as "Regulations pertaining to offences committed after consuming alcohol 1991" (hereinafter referred to as "1991 regulations") and in IGP Circular No. 697/87 (Motor Traffic Circular 28/87).

Further, there are few other Motor Traffic Circulars passed on arresting drunk drivers, using new Redline breathalyzer for breath test of drunk drivers and in regarding how to use Alcotest/Redline for drunk drivers.

As per the 1979 regulation, 1991 regulation and IGP Circular No. 697/87, the concentration of alcohol in a person's blood at or above which a person shall be deemed to have consumed alcohol shall be a concentration of 0.08 grams of alcohol per 100 milliliters of blood.

V. CONDUCTING BREATHALYZER TESTS IN SRI LANKA

Reference to the IGP Circular No. 697/87, if the police are of the opinion that the suspected and examined driver is mentally and physically sound to drive the vehicle thereafter, he should be advised to be present in the Court on the date given by the police. However, if the suspected driver is not in a position to drive the vehicle, then he should not be permitted to take the vehicle thereafter. In the occasion if there are any other accompanying person competent in driving except the suspected driver, then such person will be allowed to drive that vehicle and in the contrary, the police should take the vehicle to their custody and produce it to the Court.

The latest Circular 78/2014 provides comprehensive instructions as to how a breathalyzer tests is to be conducted. Accordingly, such test should not be carried out after the lapse of 20 minutes from the time of alcohol consumption. Furthermore, the examinee shall not be given an opportunity to smoke before the test. For this particular test, examinee`s mouth shall be washed using clean water and for that purpose, the police should only use a disposable cups. If silicon powder is to be seen on both ends of the tube, it should be cleaned and removed accordingly. After the examinee blows the balloon and results of the test are obtained, all the air in the

balloon should be removed using a white needle. Then the police officer should complete the police Form No. 414 specifying the details as to the expiry date of the balloon and the test tube, lot number of the polythene cover and should seal them together with that Form. It is stipulated in the circular that such test could be carried out in a police station or in a place where an embarrassment would not occur to the examinee. If the balloon turns into green colour and passes the red line of the balloon, the police should refer the matter to the nearest Court to be fixed for the earliest hearing date.

VI. ANALYSIS OF THE JUDICIAL PRACTICES OF SRI LANKA

As stated previously, it is a common practice in criminal courts of Sri Lanka for the accused to plead guilty for drunk driving charges. And the police draft the charges using the aforementioned offences either as a single charge or as joined charges. Subsequently, any aggrieved party is entitled to institute a civil action for the recovery of damages if any damage/hurt is done while drunk driving, from that respective driver.

Accordingly, in the event where such suspect driver pleads guilty for the charge of causing damages/hurt to someone by drunk driving and when he is brought before the Magistrate by the police, the question arises as to whether it amounts to an admission in a Civil suit which is instituted by the aggrieved party against such accused. It was held in the case of Mahipala and Others v Matin Singho (2006) that, "only if the accused had pleaded guilty in the Criminal Court, it would be admissible in the Civil suit" (Mahipala and Others v Matin Singho, 2006).

However, in the latest case of North Colombo Regional Transport Board v Aparekkage Wasantha Pushpakumara Perea (2016), the Court gave a much wider interpretation with regard to this matter as follows:

"The amendment brought to the Evidence Ordinance in 1998 by Act (No.33 of 1998), included a provision to say that, a conviction in a criminal Court is a relevant fact in a civil Court" (North Colombo Regional Transport Board vs A.W.P. Perera, 2016).

Section 41 A (2) states; "Without prejudice to the provisions of subsection (1), where in any civil proceedings, the question whether any person, whether such person is a party to such civil proceedings or not, has been convicted of any offence by any court or court martial in Sri Lanka, or has committed the acts constituting an offence, is a fact in issue, a judgment or order of such court or court martial recording a conviction of such person for such offence, being a judgment or order against which no appeal has been preferred within the appealable period, or which has been finally affirmed in appeal, shall be relevant for the purposes of proving that such person committed such offence or committed the acts constituting such offence".

Therefore, this section provides that, a conviction would be admissible evidence in a civil suit, where the fact that he (the person whom so convicted) had committed the said acts constituting the offence is a fact in issue. The law before this amendment was brought was that, a conviction is admissible only if it is on an admission of guilt. The same stance was taken in the case of Mahipala and Others v Martin Singho (2006).

Thus, this position was changed by the legislature by making the conviction, irrespective of whether it is on an admission of guilt or otherwise, admissible in a civil suit. As a result, if an accused is willing to plead guilty for a charge of causing damages/hurt to another after consuming alcohol or drug, that accused person should bear in his mind that, such plea would amount to an admission in a Civil proceeding.

It is also important to note that, in order to use such an admission, the criminal case should be between the same parties. This was held in the case of De Mel and Another v Rev Somaloka (2002) and stated that, "the admissions must specifically relate to the items of negligent driving as set out in the plaint" (De Mel and Another v Rev Somaloka, 2002). This position has been confirmed by the Court of Appeal in the aforementioned case of North Colombo Regional Transport Board (2016) as well.

In order for a conviction, for a charge of failure to avoid an accident under MTA and it to become relevant in a civil action for compensation for negligent driving, the conviction must be on the same items as complained of, by the Plaintiff, which constitute the negligent driving. If the driver has not admitted or was not found guilty of the acts of negligence complained of, then such conviction cannot be made use of to prove his negligence.

As pointed out earlier in this study, there are instances where police join additional charges along with the drunk driving charge. In most of such occasions, they incorporate the charge of reckless/negligent driving. If such a charge is levelled

against an accused, the burden lies on the prosecution to prove that charge as well.

It is worthy to consider the decree of M.V.L. Perera v M.D.G. Perera (1957) with regard to negligent/reckless driving. "A charge under section 151 (l) of the MTA, for failing to take such action as may be necessary to avoid an accident should not be thoughtlessly appended to each and every charge of negligent or reckless driving. In a prosecution under that section, the burden is on the complainant to show what action was reasonably appropriate in the circumstances and to prove that the accused failed to take that action" (M.V.L. Perera v M.D.G. Perera, 1957).

Contributory Negligence is also one of the salient areas that need to focus on when discussing about negligent driving. In the case of North Colombo Regional Transport Board v Aparekkage Wasantha Pushpakumara Perea (2016), the Court of Appeal discussed about the concept of contributory negligence and elaborated that "if a person possesses a driving license, it establishes the fact that he is competent in driving that kind of vehicle, but not having a driving license does not necessarily mean that he cannot drive that type of vehicle. It may be an offence under the law to drive a vehicle on the road without a driving license, but whether it was the cause for the accident is matter that has to be proved separately. Not having a driving license alone does not prove the negligence" (North Colombo Regional Transport Board v Aparekkage Wasantha Pushpakumara Perea, 2016).

As per the case Daniel v Cooray (1941), "in cases where the defendant pleads contributory negligence, the inquiry resolves itself in an elucidation of the question as to which party, by the exercise of ordinary care, had the last opportunity of preventing the occurrence.

As aforementioned, the MT Act, by an amendment to the section 151 (1), the legislature replaced the wording "under the influence of alcohol" to "after consumed alcohol or drug". Prior to the said amendment, the prosecution had to prove that the accused driver had impaired his ability of coordination and orientation due to the influence of alcohol. Seneviratne v Jahan (1967) case is an epitome to support this position. "A person cannot be convicted of having driven a motor car on a highway while he was under the influence of alcohol, in breach of section 151 (1) of the MTA, if the evidence does not indicate that, as a result of the alcohol he had consumed, his powers of co-ordination and orientation had been impaired or that his capacity to drive a car had been prejudicially affected" (Seneviratne v Jahan, 1967).

However, after the said amendment, the prosecution need not to prove that the accused was under the influence of alcohol and as at present, what the law requires to prove is that, the accused had driven the motor vehicle consuming alcohol.

It is also crucial to note that, it is this amendment to the MTA, which introduced the norm of "consumed alcohol" for the very first time and till then, the two known concepts in our law were "under the influence of liquor" and "smelling of liquor." However, provisions of section 151 of the MTA does not take cognizance of both the above concepts. This was discussed in the case of Sumanaratne v OIC, Police Station, Borella and another (1991).

Nevertheless, it is the burden of the prosecution to prove that the accused had a minimum concentration of 0.08 grams' alcohol per 100 milliliters of blood. This position was endorsed in the case of Nalinda Kumara v Officer in Charge, Traffic Police, Kandy and Another (2007) as follows:

"Would a mere statement to indicate a person had 'consumed alcohol' be sufficient for this purpose? My answer to this question is clearly in the negative for the reasons which could e derived from the rest of the provisions contained in the section 151 of the Motor Traffic (Amendment) Act.

It is evident that when a person is charged in terms of section 151 of the MT (Amendment) Act for having committed an offence under said section for having consumed alcohol, the prosecution has to prove that the said person had a minimum concentration of 0.08 grams' alcohol per 100 milliliters in his blood. If the prosecution fails to prove such, it would be considered as the prosecution had failed to establish an important ingredient of the offence" (Nalinda Kumara v Officer in Charge, Traffic Police, Kandy and Another, 2007).

Upon careful perusal of the aforementioned laws, it is evident that, the law relating to drunk driving covers a wide area including civil litigation though in this article, more emphasis is given towards criminal offenses.

Further, the defense counsels should also take into their consideration that, since there are many laws, rules, and regulations as to how the charges relating to drunk driving should be framed and how

breathalyzer tests should be carried out, while demanding the standard burden of proof from the prosecution, they should also bring to the Court's attention to assess whether the stipulated procedure had been correctly adhered as it is vital for a fair trial.

Thus, it shall be concluded that, gravity of pleading guilty to a charge of drunk driving is not simple as it seems, and giving such plea without assessing facts of the case and/or legal risks, could bring many unforeseen repercussions to the accused and/or could deprive the opportunity for an accused person to get discharged from such case.

VII. A WAY FORWARD

Whilst analyzing the law relating to drunk driving in Sri Lanka, it is much fruitful to scrutinize laws pertaining to this area in other jurisdictions as well. In Sri Lanka, breath test and blood test are the only two types of tests that are being conducted to assess drunk driving. However, in Great Britain, an additional method is being carried out, which is an urine test of the suspected drunk drivers. Additionally, in United Kingdom, Wales and Northern Ireland, if one has a minimum concentration of 0.107 grams of alcohol per 100 milliliters in his urine, he will be considered as a violator of drunk driving laws. Whereas in Scotland, that amount is 0.067 grams of alcohol per 100 milliliters.

Interestingly, in 2014, the Scottish government enacted 'The Road Traffic Act 1988 (Prescribed Limit) (Scotland) Regulations 2014' to reduce limits of alcohol concentration in breath, urine and blood. Accordingly, other than above-mentioned alcohol concentration in urine, limit of breath test has also been reduced to 0.022 grams of alcohol per 100 milliliters and 0.05 grams of alcohol per 100 milliliters in blood. The Scottish government has enacted this regulation upon considering 74% of positive feedback of the public during the public consultation which was held in 2012 pertaining to the reducing of alcohol limits.

There are thousands of road accidents reported in Sri Lanka per year. Considering those facts, Sri Lankan government could also take measures to strengthen the drunk driving laws and as a first step, they could also focus on reducing the limits of alcohol concentration. Further, the method of urine testing can also be introduced into our law. Increasement of fines and introducing a procedure to confiscate vehicles used by repeated offenders will also be effective in this regard.

Finally, it can be concluded that, the attention of the law makers and jurists of Sri Lanka in this particular field of law is of paramount importance. Moreover, educating and encouraging citizens to abide by prevailing motor traffic laws and improvising the role of police in enforcing motor traffic laws are also vital in order to protect the citizens as well as to maintain the law and order in Sri Lanka.

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AUTHOR BIOGRAPHY

The author is an Attorney-at-Law and a Senior Associate at the Sudath Perera Associates, Nawala. He has obtained a LL.B (Honours) degree from the Faculty of Law, University of Colombo, Sri Lanka. He is also serving as a visiting lecturer at the Faculty of Business Studies and Finance, University of Wayamba, Sri Lanka.

Statutory Commissions and Their Consequences in Sri Lanka: A Legal Perspective

SMAG Senevirathne

Faculty of Law, University of Colombo, Colombo 07, Sri Lanka

anuruddika_s@hotmail.com

Abstract - Comparative to the limited number of different organizational structures in the private sector, the Sri Lankan public sector has a diverse spectrum of organizational structures such as boards, authorities, commissions, departments, funds, bureau, corporations, institutes, agencies, councils, foundations, centers etc. Similarly, even within the same category of public entities, there are drastic dissimilarities than similarities in many perspectives including their legal characteristics. Thus, such diversifications within a common category of public entities resulted many economic, social, managerial and legal consequences. This study primarily aimed to examine the said issue by selecting statutory commissions in Sri Lanka and their legal repercussions as an example. This is a qualitative study based on primarily desk research supplemented with Black Letter law where necessary. This paper specifically aims to provide a substantive legal critic on the contemporary role and consequences of statutory commissions in Sri Lanka. The findings of the study highlighted the gap between the ideal and actual roles of statutory commissions and how such deviation caused consequence on due process of law as well as public. This study also shed light on necessary legal reforms in order to narrow the said gap and to make statutory commissions more trustworthy to the public and transform them as effective public entities. Also, the findings of this study revealed an absence of systematic and coherent legal framework pertaining to formation, continuation and winding up of such public entities, especially with reference to various commissions in Sri Lanka that have diluted the strength of such structures by curbing the anticipated outcomes. Further, such structures failed to gain public trust and confidence on their findings and recommendations. Hence, this study recommends to formulate comprehensive and systematic legal framework that is applicable to all public entities to streamline and restructure them based on their legal and functional characteristics in general to make the Sri Lankan Public sector more viable, productive and effective. Further, the recommendations were made to resolve the present loopholes in statutes related to formation and function of commissions in Sri Lanka.

Keywords: commissions, commission of inquiry, public, president, entities, structures, Sri Lanka

I. INTRODUCTION

Statutory bodies are entities established either by executive or legislature to function under special area of expertise and to make recommendations for a selected activity. Therefore, such entities gain powers, authority and ruling from the said Constitution or Statute and either from executive or legislature. Sri Lanka has diverse range of statutory bodies with different organizational traits, functions and powers. Due to the said diversification and lack of proper regulatory framework to establish and govern such entities there are many issues pertains to public sector institutions such as high inefficiency, overlap of functions and powers among different institutions and complicated and confusing processes, absence of demarcation of scope and authorities, lack of accountability etc. Upon the examination of frequency of formations of different categories of public entities, Sri Lankan public sector has shown more preference and inclination towards 'commissions' specially after post-independence compared to other statutory bodies such as boards, authorities, departments, funds, bureau, corporations, institutes, agencies, councils, foundations, centres.

The Sri Lankan history of commissions able to trace from 1833 where Ceylon was a British colony. There are many statutory commissions presently functioning in Sri Lanka related to different subject areas such as; Election Commission of Sri Lanka, Public Service Commission, National Police Commission, Commission to Investigate Allegations of Bribery and Corruptions, Finance Commission of Sri Lanka, Delimitation Commission, Official Languages Commission, Public Enterprises Reform Commission, Sri Lanka's Investors Commission,

Securities Exchange Commission of Sri Lanka, Land Reform Commission, Fair Trading Commission, Human Rights Commission, University Grant Commission, Tertiary and Vocational Educational Commission, Telecommunication Regulatory commissions of Sri Lanka, National Transport Commission, National Science and Technology Commission, The National Education Commission and Commission of Inquiry on Lessons Learnt and Reconciliation etc.

Commissions can be broadly categorized in to three types; administrative, legislative and judicial in nature. Commissions may hold hearings, issue summons, conduct research, analyse data, investigate on the subject area and make field visits as they perform their duties. Legislator/ executive have the discretion to tailor composition, structure, tenure and arrangement of the commission based on the anticipated goals of such commissions.

However, it is evident that many of the recently established commissions faced difficulty to fulfil their assigned tasks to the level of satisfaction for both legislature/executive as well as public. Therefore, the public perception and trust towards such commissions has drastically eroded in recent past due to their poor outcomes despite their high frequent formation.

II. RESEARCH PROBLEM

Regardless, there are many researches on public sector reforms pertains to administrative and legal perspectives, there is serious lacuna both globally and locally on studies related to public sector organizational types/ structures and how such different structural formation cause limitations on their performance. This is specifically true for researches on different forms of statutory commissions, their roles and their consequences. Thus, objective of this study is to exaime how legal drawbacks related to organizational formations and structures of public entites in Sri Lanka hinder their performances with the example of domestic commissions. In the said backdrop this paper raises the research questions; what are the fundamental legal issues related to formation and structures that hinder the performance of Sri Lankan statutory commissions in general and specially related to commissions of inquiries? And how to overcome such issues and their consequences?

III. METHODOLOGY

This is a qualitative legal study primarily based on desk research supplemented with black letter law where necessary. Study utilized Sri Lankan 1978 constitution and other directly related statutes to the research problem under examination. Case laws and authoritative texts were also utilized used as secondary data to substantiate the key issues and findings. Study adopted a critical analysis approach to interpret the data. The major limitation of the study is the lack of prior studies or literature on research problem or broader research area both locally and in other comparative jurisdictions.

IV. RESULTS & DISSCUSION

A. Principle and purpose of a Statutory Commission

Commissions vary in size, scope, expertise, tenure and powers. There is no legal definition for a commission nor specific traits that are mandatory to identify entity as commission or to differentiate it from other forms of public organizational structures. However, non-legal literature defines commissions as "formal groups established to provide independent advice, to make recommendations for changes in policy or to study or to investigate a particular problem, issue or event or to commemorate an individual, group or event" (Straus, 2021). Whereas Americans define commission as "an establishment of the executive branch … but which is not an executive department" (Moreno, 1994). However, commission is a multimember independent entity established either by legislators or executive, which has a shorter life span and no going concern, temporary in nature, performs advisory role, whole or partly members of the entity are appointed by the legislator or executive and primarily accountable to the appointed legislator or executive. Nevertheless, these entities supposed to act in the interest of public as they are publicly funded and not elected nor politically accountable.

When commissions are established, they are required to operate under the provisions of the enabled legislation which set out the specific purpose and powers. Further, such legislation may specify financial and non-financial activities of the commission which are authorized to preform, whether such commission able to delegate powers to any other officer and further commission represent the state or not etc. Also, commsions are permitted either full or partial independence depending on

their established purpose. Expected objectives of the commission and duties of memebers of such commissions are determined by the legislator or executive while government is accountable for public for the funds allocated for such establishments and for their expenditure incurred in the most effective and economical ways.

B. Different forms of Statutory Commissions

When it comes to domestic statutory commissions based on their tenure and goals of such establishments, such statutory commissions can be categorized as permanent statutory commission and interim statutory commissions. Permanent statutory commissions has a going concern similar to other ordinary organizations whereas interim statutory commissions formed to fulfil a particular aim within a shorter time frame. Therefore, such statutory commissions formed with specific purpose are interim bodies where after fulfilling the assigned objectives or tasks naturally get dissolved by the operations of law.

Contemporary Sri Lankan commissions are established in several forms. First, directly under Constitution. There are approximately 7 commissions directly established under present Constitution of 1978. e.g. Article 103 & 104 E - Election Commission, Article 111D- Judicial Service Commission, Article 155A- National Police Commission, 156A- Commission to Investigate Allegations of Bribery and Corruptions, 156B - National Procurement Commission, Public Service Commission originally established under Ceylon (Constitution) Order in Council 1946 with its latest amendment in terms of Sub Article 54(1) of the Constitution by 20th Amendment. Secondly, by an independent Statute passed by the legislature which subsequently comes into effect under a gazette notification to fulfil a specific purpose (e.g. commissions established under different ministries by respective ministers for different purposes).

Thirdly, by His Excellency the President of Sri Lanka under the powers vested in him under Article 33 of 1978 Constitution was able to create a statutory commission as an interim body to achieve a unique purpose within a specified time frame. History of formation of commissions of inquires commenced from appointment of commissions pursuant to Article VII of the Letters of Patent by Governor and Commander in Chief of the Island of Ceylon when Sri Lanka was Ceylon as a British colony. Subsequently, Commissions of Inquiry Ordinance No.9 of 1872 was enacted. Thereafter, Commission for Inquiry Act (Chapter 393) No. 17 of 1948 as amended by Acts No.8 of 1950, No.40 of 1953, No.8 of 1955, No.29 of 1955., No.16 of 2008 and 03 of 2019. (E.g. Commission on the Simplification of Existing Laws and Regulation in the interest of people – By Extraordinary Gazette No.2209/47 dated 07.01.2021). Thus, there are two main statutes govern Sri Lankan statutory interim commissions namely under executive; Commission for Inquiry Act (Chapter 393) No. 17 of 1948 as amended and Special Presidential Commissions of Inquiry Law No. 07 of 1978 as amended.

According to Section 2 of the Commission of Inquiry Act, it grants the President the discretion and power to set the terms of the commission and appoint to all its members. Section 3 authorizes add new members at discretion of the President. Whereas, Section 4 grant powers to revoke the warrant establishing the commission of inquiry at any time and Section 19 permit appointment of the commission's secretary without needing to consult the Commission or its chairperson. Further, as per Section 2 (2) (d) findings and recommendation whether to publicize or not solely rest on the discretion of the President.

Also, commission of inquiry was vest with powers to ascertain all evidence either written or oral, examine all persons whom the commission thinks should be procured or inquire as witnesses, administer evidence both written or oral of any witness either on oath or affirmation, summon any person residing in Sri Lanka to give evidence or produce any document in their possession, admit any evidence both written or oral notwithstanding any of the provisions of the Evidence Ordinance, to admit or exclude the public from the inquiry or any part, to admit or exclude the press from the inquiry or any part, to obtain certified copies of any proceedings of any case, any document, any other material filed or recorded at any Court of Law or at any tribunal and to require any person to produce any document or material which is in his/her possession or custody and to require any person to provide whatever the information which he/she possesses, in writing. E.g. Commission of Inquiry to Investigate and Inquire into Serious Violations of Human Rights (The Udalagama Commission). Hence, in careful analysis of this Statute it is evident while it grants wide discretion and powers for President to dictate the terms of

composition and function of commission of inquiry. Simultaneously, in absence of such measures commission of inquiry is vested powers that can arbitrarily enforceable due to any regulatory or revisionary measures.

Whereas, Special Presidential Commissions of Inquiry Act No. 07 of 1978 permit formation of Special Presidential Commissions of Inquires. Presidential Commissions of Inquiries are special form of commissions created in ad-hoc nature to conduct inquiries into a defined issue ordered by the President of Sri Lanka and to submit findings, give advice and make recommendations. While Commissions of Inquires function as only fact finding commissions, Special Presidential Commissions of Inquiries have the power to subject a person found guilty to civic disability. E.g. Mrs. Bandaranaike after being summoned before a Special Presidential Commission of Inquiry, she was found guilty and subjected to civic disability, resulting in her expulsion from Parliament. Similarly, a report, finding, order, determination, ruling or recommendation made by a Special Presidential Commission not able to challenge in any court or tribunal. The President has the discretion to appoint Judge of the Supreme Court, Court of Appeal, High Court or the District Court as a member of a Special Presidential Commission of Inquiry. Some of the notable Special Presidential Commissions formed to date are Presidential Commission of Inquiry on the Easter Attacks, Presidential Commission of Inquiry on Bond Issuance, Presidential Commission of Inquiry in relation to the activities of Non-Governmental Organizations, Presidential Commission of Inquiry in relation to the Malpractices and Corruption in State Institutions, Presidential Commission of Inquiry to investigate and inquire into Serious Acts of Fraud, Corruption and Abuse of Power, State Resources and Privileges, Presidential Commission of Inquiry to inquire into the alleged VAT fraud at the Department of Inland Revenue (Paranagama Commission), Presidential Commission on the Disappeared (The Mahanama Tilakaratne Commission), Presidential Commission of Inquiry to Investigate the Management of Sri Lankan Airlines and Mihin Lanka (during the period of January 2006 to January 2018)

However, there is a debate on the powers vested on the both Commission of Inquiry for not having adequate powers while contrary for vesting more powers on Special Presidential Commission of Inquiry. Similarly, legal critics argue that, on one hand Commission of Inquiry appointed under the Commissions of Inquiry Act as amended is not vested with any judicial powers contemplated under Article 4 (c) read with Article 105 of the Constitution, such a Commission of Inquiry would not be empowered to review any decision given by the Attorney General as an ordinary court of law and their merely fact finding bodies. On the other hand, when refer to Section 9 under the Special Presidential Commissions of Inquiry Law No. 07 of 1978, the Special Presidential Commissions of Inquires were vest special powers to makes them more powerful than a Commission of Inquiry to exceed their legal mandate. Thus, legal critics argue Special Presidential Commissions of Inquires violate the separation of powers, the rule of law, and the right to equality guaranteed under Article 12(1) of the Constitution.

Despite the above issues, these two commission types are intended to function as truth commissions. But they were formed as quiz-judicial features. Hence, it is essential for them to utilize their optimal lens of fair hearing when conducting their inquiries. Nonetheless, Section 9 of the Commission of Inquiry Act of 1948 cast duty on the commission to act in a judicial manner. Section 9 says "[...] every inquiry under this Act shall be deemed to be a judicial proceeding within the meaning of Penal Code. However, Penal Code does not define judicial proceeding but Section 2 of the Code of Criminal Procedure Act of 1979 define judicial proceeding as "any proceeding in the course of which evidence is or may be legally taken". Also, Section 16 of the Commission of Inquiry Act of 1948 attracts principles of natural justice. Thus, commission need adopt judicial proceeding subject to natural justice (Xavier, 2010).

Further, Supreme Court in *Silva and Others v. Sadique and Others*[1] examine whether commissions formed under Commission of Inquiry Act 1948 able to review by of Writ of Certiorari under Article 140 of the 1978 Constitution and held that recommendation made by a Commission of Inquiry are not subject to review as the decisions are not bidding in nature and lacks legal authority.

[1] *Silva and Others v. Sadique and Others [1978] 1 SLR 166*

C. Consequences of Statutory Commissions

Commissions are one of the frequently used statutory entities in the legislative process throughout the legal history world over and especially in Sri Lanka.The primary purpose of a commission is to provide an unbiased expertise opinion and recommendation to legislator or executive for a given complicated and controversial issue after an in-depth study. Hence, commission to be effective it should have an expertise knowledge on the selected subject, high accountability, impartiality, independency and time bound to complete the assign task within a stipulated period. Due to the limitations and delays of ordinary process of law in Sri Lanka the last several decades, the importance and frequency of forming commissions of inquiries were raised.

Scholars around the world called commissions as 'abdication of responsibility' of legislators (Lott, 2002). Thus, commissions are created by legislators specifically as a mechanism of 'blame avoidance' where legislators form commission when they confront a controversial issue without taking a substantive position on the subject in order to averse the associated risk. If the commission outcome becomes popular, legislators/executive take the credit and if the outcome attract negative public feedback blame and responsibility shifted to the commission (Weaver, 1986; Arnold, 1990). Also, they argue many commissions are undemocratic as commissions and does not represent general population of a country or problem at stake nor their diversity. Another popular critic on commissions is predetermined decision makers appointed as commission members and commission findings and recommendations are pre-decided by the legislators/executive. Similarly, members of the commission may have their own agendas, bias and pressure where they work as patronage devices to pay off their past political debts or to gain political benefit in future. Further, critics acquired that commissions largely failed to full their established objectives effectively, key issues are not adequately address, critical findings and recommendations are largely ignored and they are expensive (Straus, 2021). When it comes to contemporary application, role and practise of concept of commissions there is a serious gap in public expectation and actual deliverables especially in domestic context.

There are many negative legal consequences in general related to modern commissions in Sri Lanka such as; transforming interim commissions to permanent public institutions with the use of loop holes in respective statutes, functioning of commissions as legislative/executive power agencies and pressure groups, use of authority vested in commissions to manipulate the related movable and immovable resources under their purview, use of commission as a source of generating permanent and temporary employment, overlap of commissions authorities, powers, scope, resources etc. with other public institutions, change of the initial purpose of establishing such commissions through subsequent amendments to primary statute, lack of transparency and focus to assign tasks, confusion of whether officers assigned to commissions are members or employees in nature of their assignment, on continuation of remuneration payment to commission members and supporting staff , issues related to their performance and/or recommendations, responsibility and drawbacks of post commissional activities such as implementation of suggestions/ recommendations, practicality and effectiveness of recommendations etc.

Criticisms were also levelled against the domestic commissions and they were viewed as a political tool or tactic used by a government either to delay or refrain from taking action in a particular matter at controversy. Past Commissions of Inquiries and Special Presidential Commissions of Inquiries were also condemned for lacking impartiality and transparency and disregarding due process rights guaranteed by the Constitution. Further, these commissions were criticized as they because delays in ongoing legal proceedings, intimidating the victims and witnesses, and also for distort of evidence. (Samarakoon & Ranasinghe, 2021)

Since both statutes vest wide discretion and powers on President similarly these commissions are quiz judicial in nature, law reformers propose to curtail the power vested in President by these statutes in order to reflect and enhance the independence of commissions of inquiries. Further, they emphasis the necessity of President to be obliged to publicize the findings and recommendations of the commissions of inquiries. Also, ideally as commissions of inquiries they are ought to be fact focused and bound to deliver a non-binding conclusions and recommendations without any panel consequences. Hence, to overcome the present public distrust and dissatisfaction towards statutory commissions in Sri Lanka and to

make them more effective in their tasks and to make them accountable for the public funds they consume, it is vital to assess and understand the issues and drawbacks encounters with previous commissions before formation of any future commissions.

Also, when it comes to domestic commissions appoint by President under Commission of Inquiry Act No.17 of 1948 and Special Presidential Commission of Inquiry Act of 1978 shows a clear overlap between the legislature and executive branches where those two statutes are enacted by the parliament but commissions are formed upon the discretion and under the powers of the executive. Thus, the primary accountability of these commissions are questionable? Similar, the independence of such commissions also are at a stake. Broadly, due to the nature of establishment of the commissions, these entities are subject to varying degree of political and state powers.

V. CONCLUSION

The legal status and governance structures of statutory bodies has been described as 'a central puzzle in administrative law' (Gellhorn & Levin, 1990) and 'idiosyncratic' (Mantziaris, 1998). Upon the above analysis it is clearly apparent that it is vital to formulate a systematic legal framework to regulate all categories of public institutions to establish effective public sector in Sri Lanka. Further, it is also important to form a central authority or regulatory body to monitor and maintain the consistency among different categories of public entities which fall within the same category to ensure each and every public function under a systematic legal framework. Also, present domestic Commissions should be segregated under permanent and temporary sub-categories based on their specific purpose to manage such structures more effectively and to conclude their assigned goals and tasks within a stipulated tenure and budgets to avoid misuse and wastage of public funds and to raise public confidence in them.

Also, despite whether it is legislators or executives who breach the principle of arm's length with these commissions and attempt to meddle with a commission it amount to clear breach of independence, impartiality and autonomy of the commission which sufficient to merit the such legislators/executive has exceed their authorities and powers. Therefore, legal reforms need to address the above issues to overcome the present limitations which are undermine the willingness of the public to engage with these commissions and to bring them forward with evidence it is critical to inspire public confidence and ensure they can interact freely with these commission as trustworthy, transparent and impartial entities.

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The Role of Business in Achieving Sustainable Development Goals amid the COVID-19 Pandemic: The Legal Perspectives

AS Samarakoon[1#], KM Wijayaratne[2] and PS Matarage[2]

[1]*Sri Lanka Law college,* Hulftsdorp *Street, Colombo 12, Sri Lanka*
[2]*Faculty of Law, University of Colombo, Sri Lanka*

[#]avanisasanka95@gmail.com

Abstract - Covid 19 pandemic has become a challenge to achieve sustainable development goals. The effects of the COVID-19 pandemic, particularly on the social and financial circles in low- and middle-income developing countries, including Sri Lanka, have been especially adverse, which cause interruption of supply chains, reduced foreign remittances and FDI, among others. The Sustainable Development Goals are the diagram to accomplish a superior and more sustainable future for all. They address the worldwide difficulties, including those identified with poverty, inequality, environmental change, natural degradation, peace and justice. Achieving SDGs in this pandemic has become a very difficult and challenging task. This study identifies whether the prevailing laws are sufficient and practicable in regulating businesses to achieve the SDGs in the Covid-19 pandemic. The objectives of this research are to identify the impact of Covid 19 on sustainable development goals, to discuss the role of business in the society in achieving such goals, to analyse whether Sri Lankan laws are sufficient in steering businesses in playing their role and to propose the necessary amendments. The methodology of this research is black letter (doctrinal) methodology. This research employs a qualitative analysis of primary data including the 1978 Constitution of Sri Lanka, Sustainable Development Act, National Development Act No.47 of 1980, Industrial Dispute Act, Consumer Affairs Authority Act No. 9 of 2003, Sales of Goods Ordinance, Fair Trading Commission Act No.01 of 1987 and secondary data including journal articles and web articles.

Keywords— COVID- 19, sustainable development goals, Sri Lanka

I. INTRODUCTION

During the post Industrial Revolution era, the world began to realize the importance of other aspects of development such as environmental and social development, mainly due to the heavy environmental pollution which took place during the Industrial revolution. The concept of Sustainable Development was developed as a result of this social necessity. Sustainable Development refers to fulfilment of the needs of the present generation without compromising the rights of the future generations to fulfil their own needs. In other words, it refers to a well-balanced development which consists of economic, social and environmental aspects. This has changed the ways, how the world looked at development over the years, taking the concept of development to a whole new level. Accordingly, the United Nations Department of Economic and Social Affairs adopted 17 goals as Sustainable Development Goals (SDG) at the UN Sustainable Development Summit which was held in September 2015. Eliminating poverty, eliminating hunger, providing quality education to all the children, ensuring gender equality are only a few amongst them. As per the 2030 Agenda by the UN, every member country is expected to formulate their national policies in accordance with these 17 goals in order to achieve them to a substantive extent within this decade.

When looking at things from a business point of view, companies too have a huge responsibility in making sure these goals are achieved. Specially, when it comes to goals such as responsible production and consumption, eliminating poverty, the businesses have a major role to play.

A. The Concept of Triple Bottom Line

Triple Bottom Line concept is a tool that most businesses use when it comes to sustainability. At the very outset it can be seen that, this concept is developed around 3 P's which stand for People, Profit and Planet. In other words, the businesses are expected to consider not only its economic impact but also the environmental and social impacts when carrying out their business operations.

The social impact of businesses are twofold, namely the impact they have on their internal employees and the impact they have on the society at large. Accordingly, the businesses are required to ensure the well-being of their employees while contributing towards the development of the environment and the general public, together while achieving financial targets.

II. METHODOLOGY

This research methodology would be a black letter approach. The black letter methodology is used to provide a descriptive analysis on the area. The research would employ a qualitative analysis of primary data including, The 1978 constitution of Sri lanka, sustainable development act, national development act no 47 of 1980, Industrial dispute act, consumer affairs authority act no 9 of 2003, sales of goods ordinance, fair trading commission act no.01 of 1987 and secondary data including journal articles and web articles.

III. DISCUSSION

A. Challenges Faced during the Covid-19 Pandemic

The world has focused on carrying out the 2030 Agenda for Sustainable Development with 17 Sustainable Development Goals (SDGs) embraced by United Nations (UN) Member States in September 2015. The strange circumstance made by COVID-19, in mid-2020, is affecting this responsibility and subverting the overall methodology toward appropriateness by hindering the cycle toward accomplishing the 17 SDGs and changing the direction of improvement.

With the covid 19 pandemic many financial sectors have collapsed and some have to face many challenges in their businesses. If discuss about the examples for these,

As expressed by a report of the Central Bank, the foreign debt of Sri Lanka is more than USD 55 billion. Furthermore, alarming warnings have been made by Fitch and Moody which are worldwide evaluations offices which expressed that Sri Lanka has a “very weak debt affordability. On 24th April 2020, Fitch Ratings brought down Sri Lanka's reliability from one B to B- , by expecting that the effect of the pandemic to the economy would additionally flood with the expanding public and outside obligations.(central Bank of sri Lanka, 2019)

The stock market was closed on March 20th 2020 following the lockdown due to strong selling pressure by recording the biggest intraday fall of the stock market and all Share Price Index fell more than 6% to 4571.63 due to panic selling. However, after 12th May CSE showed an improvement implying that the attitudes of investors are gradually becoming positive.

The Sri Lanka’s tourism sector was hit hard by the Covid-19 pandemic as well. Certain investors are hesitant to proceed with these concessions and are prepared to foreclose their mortgages and close down business due to the current conditions. The greatest challenge that investors are facing under the current pandemic is that lenders are dismissing the foreclosing of mortgages since banks are likewise at serious risk.

Many MSMEs in Sri Lanka significantly failed in business as they had not been able to broaden their production measures following the Covid-19. (Gunawardana,2020)

Because of the reasons mentioned above, poverty and the inequality can occur in the country.

Worldwide phenomenon that address a center focal point of the SDGs have been essentially changed, causing us to notice new real factors and lifestyles we didn't envision previously. Mobility and migration are vigorously influenced through lockdown measures with huge human and monetary cost.

The pandemic triggers a financial emergency of huge extents with increased effect on non-industrial nations, placing an enormous number of individuals in poverty, for the first time in three decades, poverty is increasing. The monetary results are huge and boundless, influencing all spaces of the economy, including capital streams, business activities, work and occupations. (UNESCO,2020)

Conquering all difficulties presented by the COVID-19 pandemic, assembling a superior world and accomplishing SDG targets can't be accomplished by any nation alone and needs common participation and organization. For Sri Lanka, supporting the worst affected sector influenced areas that contributed the lion offer to the economy and occupations like SMEs, send out enterprises like the apparel, and the tourism industry to bounce back is mandatory yet needs the help of different nations. In such manner, common society, the scholarly world, the private sector, international financial intelligence and regional organizations can make an important commitment towards the accomplishment of the 2030

Development Agenda by activating activity, giving ability and monetary assets.

On one hand, both self-employed people and the people who depend on daily wages are severely affected as they have lost their sources of income. On the other hand, it results in a reduction of buying power of the consumers, causing reduction in demand for goods and services. As a result, sales and profits have gone down by considerable margins of majority of businesses, starting from large companies to small and medium enterprises. Furthermore, several businesses have imposed salary cuts and layoffs on their employees which has caused many people to lose their jobs.

Despite the fact that majority of industries are affected by this pandemic, there is a huge responsibility on the shoulders of the business sector, in overcoming this critical situation.

B. Existing Legal Framework on Sustainability in Sri Lanka

In the context of sustainable development, there is no single legislation that govern all the areas of sustainability. Sri Lanka as a country have enacted different legislations at times focussing on different aspects of triple bottom line concept. For instance, some statutes govern the area of environment while others govern the area of consumer affairs and labour affairs. Nevertheless, all those play vital roles in achieving a balanced development covering each and every corner. The Sustainable Development Act (Sri Lanka Sustainable Development Act, 2017) is the main piece of legislation which is enacted with the sole purpose of designing, developing and implementing National Policies and Strategies on Sustainable Development and facilitating respective stakeholders who are responsible and following up and monitoring the progress. It has also established a Sustainable Development Council, in order to carry out the responsibilities assigned from the act in accordance with the seventeen sustainable development goals. (Sri Lanka Sustainable Development Act, 2017)

When it comes to the laws that govern the social impact of businesses there are number of laws that protects both employees as well as the general public. Industrial Dispute Act (IDA) can be considered as one of the major legislations in the field of labour law which provides means of solving disputes between employers and employees, in a fair and just manner. Institutions like Labour Tribunal and Industrial Court have been establish by the act, to hear and determine matters regarding disputes such as unfair dismissals, in a just way. (Industrial Dispute Act,1950) Moreover, Alternative Dispute Resolving mechanisms such as Conciliation, Arbitration are also introduced by this act, in order to ensure that justice is served properly to all stakeholders. Apart from that, there are number of legislations in the field of labour law, such as Employment of Women, Young Persons, and Children Act, Shop and Office Employees Act, Factories Ordinance to govern different aspects such as the minimum age of employment, providing a safe work environment, leave entitlement for leave and special privileges and benefits provided for vulnerable social groups like women and disabled persons.

On the other hand, Consumer Affairs Authority has been established by the Consumer Affairs Authority Act (consumer affairs Authority,2003) in order to protect the Consumer Rights against businesses. It basically covers aspects such as price management, market investigation, consumer awareness etc and ensures that consumers are protected from unfair trade practices of companies. Apart from it, Sale of Goods Ordinance also consist provisions regarding implied conditions and warranties which guaranties the quality of the goods sold. For instance, section 15 of SOGO states that the goods sold should be reasonably fit for its purpose while section 14 states that the bulk of the goods sold should correspond with its sample displayed. In addition, Sri Lanka Standard Institution (SLSI) issues various standards on various goods, ensuring their quality. (Sale of Goods Ordinance,1896)

In the context of market competition, Fair Trade Commission Act acts as a safeguard against anti-competitive business practices and the creation of monopolies (Fair Trade Commission Act,1987) . It protects the start-up businesses and small and medium enterprises by preventing the market leaders from manipulating the market to their advantage by controlling the price at their will.

Considering the above laws and statutes, one might argue that Sri Lanka as a country has sufficient laws to regulate and guide businesses to achieve sustainable development goals in accordance with the triple bottom line concept covering all three pillars, namely profit, planet and people. However, it should be stated that, there are few unaddressed areas that needs further development in the context of sustainable development, specially during critical situations.

IV. OBSERVATION-

A. Gaps to the Existing Legal Framework in Sri Lanka

When scutininizing the gaps in the existing legal framework in Sri lanka it was evident that, as a country we lack a proper a legal regime to address uncertinity in governance, green economy and living in the digital world.

If the SDG had been observed in an early stage, country's response and control of global emergencies would be more effective. According to the SDG goal 3(D) it is the duty of the state to focus on, early warning, reduction of risks and managing the national and global risks during emergency situations. Many states were able to identify the health risks and the necessary safety precautions for the control of covid-19, with the help of expert companies in the relevant feilds. Sri Lanka as a country lack a comprehensive legal regime to get the services of the private sector as well as the public sector companies, mainly in terms of technology and facilities in combating this pandemic.

Even though Sri Lanka has relatively a strong legal framework in the context of sustainable development, it is not without its flaws. In our opinion, sustainable development goal one which is eliminating poverty, is not addressed adequately under the current legal framework. There are no proper laws formulated to transfer the economic benefits that are generated through businesses to the society as the contribution of businesses in rural and regional development is very little. It is true that some companies like Ceylon Cold Stores PLC buy raw material for their production such as ginger, vanilla and juggery from local farmers, as per their organizational values but the law does not incorporate any similar provision in that regard.

Furthermore, the lack of a comprehensive legal framework that regulates Cooperate Social Responsibility (CSR) Projects is a major lacuna in the existing legal system. At present, the concept of CSR has become nothing but a marketing tool which companies use to increase their sales. Due to the fact that the current legal system does not provide any provisions to regulate CSR projects or to measure their social impact and effectiveness, the companies tend to carry out projects in the name of CSR just for the sake of promoting their products or brand names. This again has an adverse effect on sustainability as they do not actually serve the purpose of social development or environmental development.

Another area that needs improvements in our opinion is the laws regulating the responsibilities of the consumers. It is often seen that the law makers give high importance to consumer rights yet the consumer responsibilities often go unrecognized when formulating laws. According to the sustainable development goal number 12 which is responsible consumption and production, both producers and consumers are expected to be responsible. Specially during a social crisis like today, the responsible behaviour of the consumers is of utmost importance to overcome this crisis. For instance, the essential items such as food should be distributed among all the consumers equally by mitigating excess consumption and wastage.

Moreover, there is a huge room for improvement in the implementation part as there is no proper implementation mechanism installed, specially in the government sector to carry out the provisions of the relevant statutes. Accordingly, there are substantive time delays in the implementation process and its effectiveness is often jeopardized due to this reason.

V. RECOMMENDATIONS AND CONCLUSION.

Considering the above gaps, the authors wish to make the following recommendations to the existing legal framework.

- The legal framework should be modified as to incorporate concepts like sustainable sourcing to our legal system, requiring the business to join hands with local suppliers and farmers in obtaining raw material for their production processes. In our opinion, it will not only contribute to the development of the house-hold economies of the local suppliers but also would contribute to the growth of the national economy at large.

- The public-private partnership model in Sri Lanka, The Vaccine Alliance's innovative public-private partnership model has transformed global progress by accelerating equitable and sustainable access to vaccines both at scale and pace. Since 2000, Gavi support has helped countries immunise more than 760 million children. This has helped to reduce deaths from vaccine-preventable diseases by more than 60 per cent and played a key role in halving the under- five mortality rate in those countries. Therefore, a great necessity has arisen to develop a comprehensive legal framework governing as stated in the SDG 17.

- The necessary amendments should be introduced to regulate the businesses to contribute to the regional and rural development by creating job opportunities. It would also provide a solution to the

issue of unemployment while utilising the work force of the country for the national development.

- Furthermore, the due importance and recognition should be given to consumer responsibilities by formulating necessary laws to regulate the behaviour of the consumers. For instance, maximum limits of quantities can be imposed for the purchase of essential items in order to minimise the wastage of such items and thereby ensure the uninterrupted supply the same. The laws should be formulated in such a manner that the economic benefits would flow to each and every layer of the society.

- More importantly, an effective and efficient implementation mechanism should be introduced to ensure the smooth operation of the laws and regulations in this regard. The researchers propose that the law enforcement officers such as police officers and administrative officers should be given the necessary trainings in order to uplift their performances and the whole implementation process should be made free of bribery, corruption and political influences.

However, the above recommendations in our view, would certainly be instrumental in achieving sustainable development goals such as eliminating poverty, eliminating huger, reducing inequalities and ensuring responsible production and consumption. As stated in the beginning, the businesses play a huge role in the modern society through which, an enormous contribution could be made in overcoming this global pandemic as a country and achieving sustainable development goals.

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AUTHOR BIOGRAPHIES

Avani Sasanka Samarakoon is a LL.B. graduate of General Sir John Kotelawala Defence University and currently studies as a Final Year student at the Sri Lanka Law College and also reading for her master of laws in International Business law at Cardiff metropolitan university. Her research interests are Commercial Law, Criminal Law and Labour Law.

K.M Wijayaratne completed the LLB degree at the faculty of Law, university of Colombo with a second class and completed the Sri lanka law college final year examination with a first class hounours. He is practising as an Attorney at Law while reading for his master in laws degree at Cardiff metropolitan university. His current research interest includes criminal justice, Environmental Law and Labour law.

Prashani Sapna Matharage completed her LLB degree from faculty of Law, university of Colombo and currently practicing as an Attorney at law in criminal law matters and fundamental rights application in sri lanka. Also, she is working as a research assistant to the criminal law reforms committee attached to the ministry of justice. Her current research interest includes criminal Justice, money laundering, cyber crimes and intellectual property.

Theoretical Foundation and Contemporary Application of the Concept of "Social Engineering" to Intellectual Property (Amendment) Act, No 08 of 2021

SASP Hansitha# and DPDN Kularathna

Department of Legal Studies, Faculty of Humanities and Social Sciences, The Open University of Sri Lanka, Nawala, Sri Lanka

#pasindu1hansitha@gmail.com

Abstract - Justice is a universal aspiration, and the feeling of injustice is a powerful human emotion. However, injustice is essentially a conflict, and a society without justice as a governing principle is an unstable society bound together by some form of coercion. Moreover, law and justice are subjected to different interpretations over time, but the common standard has not been changed. That is, the diversity of justice does not always coincide with the consensus of law and society. Alternatively, one person's request for legal justice may contradict another person's request. Intellectual Property plays a vital role in modern economies as a valuable intangible asset. Particularly, copyrights and related rights can be considered as one of the most viable intellectual property rights which can easily be acquired as well as unduly exploited. Digitization makes it easy to make unauthorized copies of copyrighted works in seconds. Inevitably, the misuse of property rights will challenge the skills and interests of dedicated owners to create that work with financial intent. The main purpose of this article is to explore the possibility of access to intellectual property in the face of the visually impaired community, and to identify and validate the changing nature of copyright and related rights challenges in the age of digitization. It discusses the involvement of the domestic law-making mechanism in recent developments in the protection of copyright and related rights in a digital environment to achieve these objectives. Finally, this article seeks to identify gaps in the Sri Lankan law and to develop copyright and related rights law to strike a balance between the rights of owners, the general public, and the visually impaired community. This research is a legal inquiry into the inextricable link between law and society throughout the theoretical foundation and contemporary application of the concept of "Social Engineering" to intellectual property (Amendment) Act, No 08 of 2021.

Keywords— intellectual property rights, social engineering, sociological jurisprudence, copyright

I. INTRODUCTION

The idea of "social utility" is that the good of most societies leads to the happiness of the majority. According to "Roscoe Pound," in the transition from a conflict-ridden society to modern society, the Law was changed based on social expectations. Also, the function of Law later integrates to perfect the maximum strengths and efficiencies of a human-made society in a highly competitive race to achieve unlimited needs. Thus, social engineering has become the foremost spirit of the school of sociology, which gradually developed after Auguste Compte, who planted the seeds of sociology.

The Law of sociology is built on the premise that "law" should always be discussed in a social context. According to Auguste Comte, "law is a tool used to satisfy human needs," and Rudolf Von Jhering recognizes that the Law must also act as a mediator, balancer, and harmonizer in society. Similarly, philosophers such as Rudolf von Jhering, further developed the theory of utility and rights. Roscoe Pound recognized the legal and judicial process of making laws according to social aspirations as a social engineering method. Pound's task was to find a new way to achieve social goals based on the Rule of Law, and he believed that the Rule of Law was not just a set of legal rules but an entire legal system. Accordingly, the sociological school emphasizes the need for more organized and legal authorities to build a more realistic legal environment.

Regarding this situation, Prof. Hari Chand's opinion can state as follows. "Just like an ordinary engineer, a lawyer is also involved in engineering. The shape and purpose of social engineering are to persuade a lawyer to shape and change the Law. That is, the primary purpose of the Law is to balance the rights that are recognized. As Pound identified, the rights of society are of three kinds. They can express Individual, Public and Social interests.

Of the above rights, social rights are in constant conflict with individual rights. The subject area of intellectual property can describe as a key area of Law in which such conflicts exist. The concept of "copyright" originated in the Chinese printing industry centuries ago and later evolved into intellectual property law. There is a constant conflict between the rights of author and reader's rights, and in many cases, less attention is paid to the rights of the reader.

II. RESEARCH METHODOLOGY

This research is normative research which is primarily based on an extensive literature review. The research comparatively studies the application of the concept of “Social Engineering” to Intellectual Property (Amendment) Act No 08 of 2021. The purpose of selecting Comparative methodology is to identify the recent development in this field and discuss its applicability into the Sri Lankan context. As primary sources, International Instruments, Legislations and case law such as the WIPO copyright treaty of 1996, WIPO performance and phonograms treaty, Intellectual property Act No 36 of 2003 and Intellectual Property (Amendment) Act No 08 of 2021 in Sri Lanka have been used in this research. Furthermore, journal articles, Web resources, and textbooks are referred to as secondary sources to enrich the research.

III. INTELLECTUAL PROPERTY LAW

In Human history, historians have historically used imagination, innovation, and creativity to solve problems. Albert Einstein, the great genius of the 20th century, argued that imagination is more valuable than knowledge. Intellectual property is based on the power of the imagination and is an invisible and intangible property.

Professor W.R. Cornish's view on the importance of intellectual property law can quote as follows. "The subject (Intellectual property law) is growing in importance, to the advanced industrial countries in particular, as the fund of exploitable ideas becomes more sophisticated and as their hopes for a successful economic future come to depend increasingly upon their superior corpus of new knowledge and fashionable conceits. There has recently been a great deal of political and legal activity designed to assert and strengthen the various types of protection for ideas."

Intellectual property is the product of human intelligence. Article 27 of the UDHR states, "every person has the right to defend the moral and physical rights of the scientific, literary or artistic production of which he is the author." There are three practical aspects of intellectual property. That is, how to acquire intellectual property, how to maintain it and additionally, how to protect. The World Intellectual Property Organization, based in Geneva, protects and promotes the intellectual property rights of its member countries and administers 26 international conventions on intellectual property, including the Universal Declaration of Copyright, the Trade Agreement on Property Rights (TRIPS).

The Intellectual Property Act No. 36 of 2003 has been introduced to provide legal protection to works of art produced by individuals or groups. The registration of intellectual property through this Act and power administration has been delegated to the Sri Lanka National Intellectual Property Bureau.

IV. INTELLECTUAL PROPERTY RIGHTS

Article 27 (2) of the Universal Declaration of Human Rights recognizes intellectual property rights as a fundamental right and other rights. Accordingly, every person has the right to enjoy the spiritual and physical benefits of a scientific, literary or artistic work created by his or her authorship. Furthermore, article 1 of the First Additional Protocol to the European Convention on Human Rights and the Byrne and Paris Conventions, recognized as the great pillars of intellectual property law, recognizes intellectual property rights.

Various arguments have been made for the justification of intellectual property rights and their security. However, from the perspective of a school of natural law, the creator of intellectual property has always embodied natural rights in his or her intellectual achievement. Therefore, society is morally obligated to present and execute that property right to him.

Nevertheless, in contrast to the approach to natural Law, utilitarianism argues that society needs those rights because of the contribution of intellectual

property to the general well-being of society. Utilitarianism argues that incentives should give to inventors and authors and that careless use of resources without property rights can lead to a common tragedy. This utilitarianism approach is most clearly stated in the United States Constitution "Us congress has to power "To promote the progress of science and useful arts by securing for limited times to authors and Inventors the exclusive right to their respective writing and Discoveries."

In addition, the theory of the granting of a monopoly to justify intellectual property rights states that the creator must benefit from his or her service. Therefore, based on the main arguments of Monopoly-Profit-Incentive and Exchange for Secret, it justifies the granting of exclusive rights to intellectual property. However, this theory is based on trade and commercial objectives rather than rights based on Natural Law.

V. COPYRIGHT AND PUBLISHERS' RIGHTS

Copyright is one of the branches of intellectual property law. The primary purpose behind it is to benefit the author through the exclusive legal rights of the individual, which encourages the creation of a more economically aesthetic intellect. By WIPO definition, copyright is simply the legal protection granted to the owner of the original work. Section 6 (1) of the Intellectual Property Act 2003 states that the concept "protects not only original intellectual creations but also derivative works as artistic, academic and scientific works under this Act."

In the case of *University of London Press Ltd v. the University Tutorial Press Ltd (1916)*, Judge Peterson defined intellectual creation as "not necessarily an original publication or a new concept, What is needed is not the freshness of the ideas in the design, but the novelty of the ideas presented." This concept was acknowledged locally by Judge Dheeraratne in *Wijesinghe Mahanamahewa v. Austin Canter (1986)* and later in *A. C.Alles v. Wasantha Obeysekera (2000)* in question

Just as intellectual property is a valuable intangible asset in the modern economic and social context, copyright and related rights can easily infringe upon in the face of the spread of modern digitalization. With the advancement of technology, the evolution of society is accelerating, and the need to protect copyright is increasing. Article 15 of ICESER states that the creator has the right to exploit his intellectual property, and also, society has the right to exploit the intellectual property. Here we must ask how the rights that conflict with the scope of the publisher's intellectual property rights and the fair use of society in a digital environment are balanced and how this amended Act further enhances it. If the copyrights are divided into two basic stages, they can be divided into economic rights and moral rights. Economic rights are in the general sense, and moral rights are the right of the author to be the author of his or her work and resist distorting the work. These moral rights can be considered as paternal rights attributed to specific creations in addition to economic rights.

VI. CONFLICT BETWEEN INTELLECTUAL PROPERTY RIGHTS AND PUBLIC WEALTH

Jurisprudence can explain the relationship between intellectual property rights and human rights through two philosophical foundations from a legal point of view. The conflict approach points to the fact that intellectual property rights, which are individual, are constantly in conflict with common social rights. The general opinion is that intellectual property rights limit economic, social and cultural rights. It has become the basis of the conflict approach that it is appropriate to accept the commonwealth concept in any of these conflicts.

The Coexistence approach enforces intellectual property rights through human rights and cooperation. Attempts have been made to balance rights by providing the public with adequate access to intellectual property to resolve conflicts.

The General Comment No. 17 of the Committee on Economic, Social, and Cultural Rights, which aims to balance this conflict and promote public welfare, states that human rights should take precedence over intellectual property rights. The TRIPS Convention also used a favorable interpretation of the use of the intellectual property for human rights. Article 7 states that member states must contribute to protecting and activating intellectual property rights and the balance of rights.

The Intellectual Property Act 2003 has succeeded in enforcing fair use, compulsory licensing, protection term, and termination of rights to strike a balance between rights, giving the copyright authority and the social right to benefit from intellectual property. However, in *Lalitha Sarathchandra v. Upulshantha Sannasgala*, Honorable Judge KT Chithrasiri is engaged in a more detailed analysis in the Commercial High Court.

The doctrine of fair use permits copyright work, which would otherwise be construed as infringements25its provides an important exception and defense for a certain type of use of copyright works, which are considered fair under copyright law.

In the case of *Hubbard v. Vosper*, Lord Denning explained what the meaning of fair use is. According to him, "fair use is difficult to explain. You should first consider the number of pages you will be quoting. If it is a huge quantity, how can it be justified? Next, however, you have to ask what it is used for. If such an excerpt is made for comment or critique, it may be considered fair use. However, if that quote were made to express opposition, it would not be fair use. Likewise, it would be unfair to make a concise critique of a long quote. On the other hand, it is also fair to make a lengthy critique with a short quote.

However, *Triangle Publications v. Knight-Ridder News Papers case*, the U.S. Court of Appeals states in the "The question of fair use has been appropriately described as the most troublesome in the whole of copyright Although no definition of refers fair use that is workable in every case has ever evolved, a frequently quoted definition of fair use is a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner (by the copyright). "

The concept of fair use is also enshrined in the Intellectual Property Act of 2003. Article 9 of the Act introduces the concept of fair use of the reader and grants economic rights to the copyright holder of a work. Section 11 also sets out how it can be implemented. Mr. D.M. Karunarathne comments on Article 11: "The purpose of fair use of referred to in this section is merely a set of examples. They do not constitute an exhaustive list. Thus, these provisions are obviously open-ended". As a result of these provisions, the concept of fair use in the country was put into action, and under fair practice, the fair rights of the readership are often discussed.

Although Section 11 (1) of the 2003 Act refers to fair use, it does not define the limits of fair use. In the *Lalitha Sarathchandra v. Upulshantha Sannasgala* case, the respondent had to pay Rs. 2 million as compensation to the plaintiff for violating the authorship beyond this fair use. Also, the University of London Press v. The University Tutorial Press proceeded with the case. That opinion *Vasantha Obesekara v. A.C.Alles* was also recognized locally in the case.

Article 12 contains a list of behaviors permitted within the "limits of fair use." This is very similar to sections 108 and 109 of the 1976 United States Copyright Act. However, the 2003 Act does not address the reader rights of the visually impaired community.

VII. RIGHTS OF THE VISUALLY IMPAIRED READER COMMUNITY

Referring to the Intellectual Property Amendment Act No. 08 of 2021, it can be understood that it is intended to facilitate the use of such print media for the visually impaired or those who cannot use the print media due to any visual or physical disability. By reading the passage, added to the sentence. It is further expanded through sections 2 (a) (b) and (c) of the amended Act.

Sri Lanka ratified the United Nations Convention on the Rights of Persons with Disabilities in 2008. Article 14 of Chapter 3 of the 1978 Constitution guarantees the right of every person to freedom of speech and freedom of expression, including the right to information. *Ninth Circuit's Robles v. In Domino's (2019)* case, the U.S. Supreme Court stressed that the visually impaired community must establish the right to access Web site information. Because of these facts, persons with disabilities should be treated as part of the special care of the Law. The central group in this dissertation, the "Visually Impaired Community," should examine whether Sri Lankan intellectual property laws can guarantee equal rights and opportunities in the use of the intellectual property.

Research shows that only 1% of works published in developing countries are published in the visually impaired community. The WIPO-controlled Marrakesh Agreement establishes a set of limitations and exceptions to traditional copyright law. It facilitates the production and exchange of "accessible models" specifically adapted for the visually impaired. According to Auguste Comte, "Law can be identified by analyzing the social context of a growing living organism according to a scientific methodology. It is also the responsibility of the individual and the state and society to study the Law of sociology. Accordingly, the Intellectual Property (Amendment) Act No. 08 of 2021 has been introduced to incorporate the Marrakesh Agreement ratified by Sri Lanka in 2016 into the country's legal system.

VIII. INTELLECTUAL PROPERTY AMEDMENT ACT NO.08 OF 2021 AND THE RIGHTS OF VISUALLY IMPAIRED READERS

2021 Amendment Act should balance the conflicting rights between intellectual property rights and the aspirations of society in general. The main point to be seen is the sentence added to section 5 (1) of the 2003 Act through the amended section 2 (1). It is further expanded through sections 2 (a) (b) and (c) of the amended Act. It can be understood that the Intellectual Property Act No. 08 of 2021 aims to facilitate the use of such print media for the visually impaired or those who are unable to use the print media due to some physical disability. Also, the word "author" has been replaced by "beneficiary" in the amended Act. Section 12 (a) 1 of the Act provides for "fair use and controls are vested in the competent authorities of Article 12 (2)

By the insertion immediately after the definition of the expression "author" of the following definition. "beneficiary person" means any person who (a) is blind; (b) has a visual impairment or a perceptual or a reading disability which cannot be improved to give visual function substantially equivalent to a person who has no such impairment or disability and is unable to read printed works to substantially the same degree as a person without any such impairment or disability; or (c) is otherwise unable, through physical disability to hold or manipulate a book or to focus or move eyes to the extent that is acceptable for reading, regardless of any other disability;" With such a broad definition, we can easily identify the marginalized visually impaired community, and this Umbrella Term also provides a strong backing to secure their rights.

By the insertion immediately before the definition of the expression "audiovisual work," of the following definition: – '" accessible format" means a copy of a work in an alternative form or manner which gives a beneficiary person access to such work, including to permit such person to have access as feasibly and comfortably as a person without any disability which a beneficiary person has. The accessible format copy shall be used exclusively by beneficiary persons. It shall respect the integrity of the original work, taking into consideration the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary person;".

Thus, for those who cannot use the print media due to visual impairment or physical disability, an audio recording of any book can be released for their use. Software is used for this purpose. Furthermore, the amendment states that such audio recordings can convenience the persons with special needs mentioned above without any payment.

It is important to understand that third parties make money illegally by distributing copyright electronically in digital systems. Intellectual property law must be able to strike a balance between the rights of the publishing owner and the rights of millions of users in the digital environment. By activating that mechanism, no one can misuse it for commercial purposes. Section 3 of the Amendment Act 2021 has been amended so that no one can misuse it for commercial purposes by activating that mechanism. It removes commercial or for-profit purposes through amendments to Article 12 of the Main Charter and new additions. It is also subject to the Director-General of Intellectual Property, which is an authoritative entity.

An authorized entity shall

I. be such persons or organizations as shall be prescribed by the Minister in consultation with the DirectorGeneral of Intellectual Property;

II. make available to any beneficiary person copies of any work in an accessible format on a non-profit basis recovering only the cost of the production of such work in an accessible format;

III. ensure that copies of any work in an accessible format are used only by a beneficiary person and take reasonable steps to prevent its entry into ordinary channels of business;

IV. limit the supply of copies of any work in accessible format only to adapt, reproduce and issue copies of such work to the beneficiary persons or any other persons acting on behalf of the beneficiary person;

V. discourage the reproduction, distribution and making available of unauthorized copies of any work in an accessible format; and

VI. Maintain due care in, and records of its handling of copies of any work in the accessible format while respecting the privacy of a beneficiary person. "

Given the above, the Intellectual Property (Amendment) Act No. 08 of 2021 provides a high level of security for the author's economic and moral

rights while working to win the rights of the visually impaired community, which has hitherto been a gap in the Law, prioritizing the concept of equality without discrimination. Similarly, the state should establish a separate Police Bureau to implement the intellectual property law currently in force in the country. At the same time, a mechanism must be put in place to address the demands of communities such as the visually impaired, who are less likely than the average person to stand up for their rights.

Here I would like to draw your attention to the principle of equality enshrined in Articles 12 (1) and 12 (4) of the Constitution. Its essence is that equality before the law and eliminating disadvantages or inequalities that afflict a section of society must be eliminated. Here we can identify two strategies or tools to eliminate injustice and disadvantage, which are the intended objectives of core equality. These methods have provided relief to communities experiencing social and economic disadvantages through affirmative action and fair classification. In the judicial interpretation of Affirmative Action litigation, Reverse Discrimination (Reverse Discrimination = Positive Discrimination) claims their rights by claiming that they are at a disadvantage over the other. Granting facilities to institutions as a prelude to positive government intervention in protecting the rights of persons with disabilities No. 28 of 1996 and Gazette Notification No. 1467/15 of 17.10.2006 and Public Administration Circular No. 27/88 of 17.10.2006. It can be specified.

IX. RECOMMENDATIONS AND FUTURE STUDY REQUIREMENTS

The Intellectual Property (Amendment) Act No. 08 of 2021 further protects the copyright and further expands the access of the entire readership to intellectual creations. At the same time, the new Amendment Act has taken it to another level where it is possible to focus on the rights of the entire visually impaired community. And defining the jurisdiction of the law suits of the infringements of copyrights and related rights in a digital environment. This would immensely help to obtain a speedy and cost effective remedy in the inrigment of copy rights and related rights.

Although the new Amendment Act authorizes the protection of copyright rights from third parties for commercial purposes, measures must be taken to minimize the violation of those rights in a digital environment. It may be proposed to establish a collective management system on copyright and related rights, which is specifically intended for this purpose. It will act as a liaison between intellectual property owners and users.

Also in examining the legal framework of Sri Lanka, the remedies under Section 170 of the Intellectual Property Act are not sufficient to cover the rights violations that take place in a digital environment. Therefore, the redressal of those rights in digitization must be addressed.

Intellectual property is the ultimate result of one's mental manipulation. There are several mechanisms in place in legal systems around the world to secure the common good of society and to protect the rights of all in intellectual property law. Internationally, the above mechanisms must be incorporated into the Intellectual Property Act of Sri Lanka to maintain a balance between intellectual property rights and common rights.

Then a national policy on the intellectual property system should be put into action through a practical and efficient mechanism. As a developing country, Sri Lanka should take steps to integrate formal security systems into intellectual property systems by providing examples from developed countries.

X. CONCLUSION

Thus, intellectual property law and policymakers have made a positive effort to balance the conflict between public social rights and individual rights through the new Amendment Act, avoiding the tendency to neglect personal representation for the common good in the making of laws.

In Rosco Pound's statement, "The law must be stable, but it must not stand still," the Law is a static phenomenon, but it is not static, but realistic that Law must change it from time to time. Therefore, we can summarize the above as balancing the conflicting rights of rights and social rights, addressing the fundamental equality and justice, and positively manipulating the rights of the visually impaired.

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AUTHOR BIOGRAPHIES

TheAuthor is a final year student of the department of Legal Studies, Open University Sri Lanka. He holds a BA(Sp) in Social Statistics from the University of Kelaniya, an BSc. Business Administration from the University of Sri Jayawardhanapura.

The author is a final year student of the Department of Legal Studies, Open University Sri Lanka and a Medical Officer in Sri Lanka Ayurveda Medical Service, and a Former Visiting Lecturer in Gampaha Wickramarachchi Ayurveda Institute. She holds BAMS(Hons) in Ayurveda Medicine and Surgery (University of Kelaniya). Her research areas are Gynecology, Cosmetology, Medical Tourism, Human Rights, and Jurisprudence Law.

A Review of Tobacco Taxation and Packaging Laws in Sri Lanka: Suggestions for Development

SGT Indika

Department of Legal Studies, Open University, Sri Lanka

singhapurageti@gmail.com

Abstract - Tobacco products are consumed in a large scale in Sri Lanka. Cigarettes and Beedis are the most consumed tobacco products by the Sri Lankans. Over 80 percent smokers use cigarettes and 10 percent use beedis in Sri Lanka. The Sri Lankan Government has imposed laws to govern the tobacco industry. Act No. 27 of 2006 on National Authority on Tobacco and Alcohol is the first legislation which regulates the industry and tobacco consumption. 80 percent of pictorial health warnings have been introduced under this Act. Tobacco Tax Act was imposed in 1999 and the tobacco tax was extended to include manufactured tobacco such as cigarettes, cigars, beedis and piped tobacco. Sri Lanka also imposed over 60 percent taxes on cigarettes. The Government earned Rs.32 billion as tax income from the tobacco industry in 2020. As a consequence, cigarette prices increased substantially too. High prices can benefit smokers who desire to quit, reduce the overall consumption of tobacco, and put smoking cessation on their radar for those who continue to smoke. Increased taxes also have a positive impact on non-smokers as it reduces the possibility of their being passive smokers, by reducing their exposure to second-hand smoke. High prices of cigarettes might influence the smokers to find some alternatives. The data on the increase of beedi consumption and illicit cigarette manufacturing provide sufficient evidence to support that assumption. Now it is time for the Government to identify lacunas in laws and develop Sri Lankan laws related to tobacco control.

Keywords— tobacco taxes, cigarette, Beedi

I. INTRODUCTION

Globally, tobacco is the reason for more than 15 percent of deaths among men and 7 percent of deaths among woman (ADIC,2017). In Sri Lanka, it was 10 percent from the total deaths per year (WHO,2018). According to the Alcohol and Drug Information Center Sri Lanka (ADIC), cigarette covers 88.3 percent in the tobacco market. Not only cigarettes, but also *beedi* is consumed in Sri Lanka and that is 10.1percent in the market. Ceylon Tobacco Company PLC (CTC) holds the monopoly of cigarette manufacturing in Sri Lanka. In 1999, Sri Lankan Government imposed Tobacco Tax Act to regulate taxes of the industry. Act no 27 of 2006 on National Authority on Tobacco and Alcohol is the first legislation which regulates the tobacco industry. Accordingly, the objective of this research is to analyze the impact of existing tobacco taxation and packaging laws through tobacco industry factors.

II. METHODOLOGY

This research is conducted referring to secondary sources by an extensive review of literature. This research referred the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka, Acts and other regulations related to tobacco industry and the surveys done by reputed institutions regarding tobacco usage. This research used Annual Reports of CTC, Ministry of Finance and Sri Lanka Customs support the conclusion. This research further referred relevant journal articles and published research on tobacco industry in drawing conclusions.

III. RESULT AND DISCUSSION

A. Tobacco Consumption And Health Problems

Around 20,000 Sri Lankan citizens die every year due to tobacco related health complications. Among smokers, 88.3 percent smoke cigarettes and 10.1percent use beedi. 1.6 percent use Cigars. (ADIC,2020)

Cigarette consumers in Sri Lanka as an age group is as follows.

Table 1- Age groups and Cigarette consumption percentage – 2016 to 2018

Age group / Year	2016	2017	2018
15-24	29percent	18.3percent	21.5percent
25-39	38.4percent	23.9percent	28.6percent
Over 40	32.6percent	26.7percent	31.9percent

Source - TOBACCO FACT SHEET 2018 – ADIC SRI LANKA

Table 1 highlights the rate of current consumers, which has increased in 2018 compared to 2017. However, 2018's increased rate was lower than the increased rate in 2016.

According to the World Health Organization (WHO), tobacco attributed death rate is 10 percent from all other deaths per year in Sri Lanka. Among those deaths 53 percent are cerebrovascular diseases. 13 percent are chronic respiratory diseases and 11 percent are cancers. (WHO, 2018) The risk of having lung cancer is ninety five percent higher in people who smoke 100 cigarettes in an year than people who smoke 100 or less cigarettes in the same time period. (Chulasiri et.al, 2017)

The productivity of those with tobacco-related illnesses is low and they are either absent from the labour market or leave the labour market early due to health issues. They also tend to be a threat on non-smokers by second-hand smoking. Further, the tobacco users, their families and friends are affected by economic consequences in addition to the health consequences. Hence, tobacco course huge cost on individual or domestic income in south Asia. Because money spend to tobacco, should be spend for basic necessity, food, shelter or for the education. (Wijesinghe, 2019)

B. Tobacco Products Market In Sri Lanka

In the British colonial era, the British American Tobacco, one of the world's leading multinational company established a subsidiary in Sri Lanka in 1906. Ceylon Tobacco Company PLC (CTC) was established in Sri Lanka in 1932. It is operating as a subsidiary of British American Tobacco which owned 84.13percent of shares in 2020 and Philip Morris brands SARL held 8.32percent (CTC,2020).

It can be observed that two largest tobacco companies in the world have owned 90 percent of shares of the CTC. According to the Tobacco atlas, "the combined revenues of the world's six largest tobacco companies in 2016 was worth more than USD 346 Billion, and their revenue is 338 percent larger than the Gross National Income (GNI) of Sri Lanka. The industry is a powerful force that does not fear the actions of nation-states because of their extensive resources and financial and global market power." (Tobacco Atlas, n.d.)

CTC holds the monopoly of cigarette manufacturing in the country. According to the Annual reports published revenue and other operational details are as follows.

Table 2: Turnover, Operating Profits and Cigarette sticks sold of last 5 years of CTC

Year	Turnover Rs.Million	Operating Profit Rs. Million	Accounted Government levies and income tax Rs.Million	Cigarette sticks sold Billion
2016	121,525	20,369	98,437	3.9
2017	138,539	23,066	117,371	3.15
2018	145,298	25,904	122,839	3.15
2019	141,342	27,057	117,250	2.6
2020	132,149	24,671	109,931	2.3

Source: CTC ANNUAL REPORTS 2016 TO 2020

Table 2 shows increase of cigarette sticks sold in 2017 remains stable in 2018. However, turnover and operating profit has increased over time. The reasons for that increase could not be identified in the existing data. In 2019, it showed a decrease in turnover and cigarette quantity sold. However, operating profit has increased compared to the three years before. In 2020 it shows a decrease in Cigarette sticks sold, turnover and operating profits.

According to the CTC, the legal sales of cigarettes have declined. However, the illicit sales and the sales of *beedi* has significantly increased. The reasons for this situation are the price differences between legal and illegal products and frequent excise-led price increases have resulted in price hikes of legal products. (CTC, 2020)

Beedi is popular among the people having low-income in rural areas in Sri Lanka. *beedi* is manufactured by wrapping crushed dry tobacco leaves in a special type of paper imported from India or bidi leaf called Tendu. In 1995 to 1999 annual *beedi* sticks production is about 3 billion. In 2007, the estimated beedi production decreased to 1.14 billion sticks, but in 2009-2013 it returned to the annual level of 3 billion sticks. (ADIC, 2014)

C. Tobacco Governing Laws and their Functions

1) Tobacco based tax law

In Sri Lanka Tobacco has been taxed since 1953. In 1999 the government passed Tobacco Tax Act and it has been amended in 2004. From 1999, tobacco tax was extended to include manufactured tobacco such as cigarettes, cigars, beedis and piped-tobacco. Sri Lanka levies a mixture of taxes on tobacco. Such as Excise special provision tax, Value added tax, Nation Building tax, and Tobacco tax. Not only those taxes but also income tax and custom duties for imports are applicable. The Minister in charge was given authority to change the tax rates by an order published in a gazette.

Sri Lanka Government only has power to set the cigarette tax, however, not the Cigarette price. Usually the tobacco tax is revising by the Government annually. Cigarette prices depend on the taxes imposed. As an Example, tax was revised on two occasions in 2016 and as a result Cigarette prices had increased rapidly. The price of John player Gold Life brand increased from LKR 32 to LKR 55 (171.88percent) because of the tax revision. (TobaccoUnmasked, n.d)

According to the WHO's Global Tobacco Report, total government tax percentage takes 62.15 percent in 2017. In 2018 it increased up to 66.2 percent (WHO, 2019). Entities that manufacture and sell tobacco products pay 40 percent income tax to the government. Sri Lankan Government charge 85 percent tax on imported cigarettes.

Table 3 - Sri Lanka Government Tax income from Cigarette and tobacco.

Year	Domestic consumption base / Excise tax (Rs. Million)	Total Tobacco tax revenue (Rs. Million)
2020	94,345	32,801,536
2019	87,367	38,565,392
2018	92,198	45,749,663
2017	86,002	45,367,003
2016	88,792	39,819,451
2015	80,015	34,049,349

Source: ANNUAL REPORTS OF MINISTRY OF FINANCE 2015 TO 2020

Article 6 of the WHO Framework Convention on Tobacco Control (WHO FCTC) says "Price and Tax Measures to Reduce the Demand for Tobacco". WHO FCTC Article 6 recognizes the importance of high tax policy of the government. The high cost of tobacco may not be attractive for new users. It reduces consumption of current users, and discourages people who have quit smoking from restarting. Children and youth, particularly, respond positively to the price increases.

On the other hand, the disadvantage of high cigarette prices may increase the consumption of *beedi* and other illegal substances. They may be harmful to one's health than legal cigarettes. Smuggling is the main source of illicit cigarette trade in both large and small scales. A government may lose tax income and illicit cigarettes flourishes in the market. Following table shows the excise duty revenue earned by Sri Lanka Customs and values of imported tobacco products forfeited in 2017 to 2019.

Table 4- Excise duty revenue earned by Sri Lanka Customs and values of imported tobacco products forfeited in 2017 to 2019.

year	Custom duties on imported Cigarettes (Rs. Million)	Value of Tobacco products forfeited (Rs. Millon)
2019	87,547	89,834,900 (Sticks 1,690,000)
2018	92,198	61,931,300
2017	85,956	64,849,008

Source: SRI LANKA CUSTOMS: ANNUAL PERFORMANCE REPORTS 2017-2019

It can be observed the value of forfeited tobacco product is higher than the duties charged on imported cigarettes. Value forfeited tobacco products have increased over 30 percent more than in 2017.

Beedi industry thrives in the shadows and remains unchecked through regulation or taxation. Tobacco taxation Act provides no provisions relating to Excise taxes being levied on the final *beedi* products. The only taxes levied on *beedi* are on the tendu wrapper, which is imported from India. This regulation imposed by the Gazette no 2069/2 dated 01.05.2018. This regulation comes under the No 19 of 1962 Revenue protection Act. Not the Tobacco Tax Act.

2) National Authority on Tobacco and Alcohol Act

The National Authority on Tobacco and Alcohol Act No 27 of 2006 is the law which governs tobacco in Sri Lanka. It imposed restrictions to smoking in public places, Tobacco products packaging and labeling requirements, advertising, promotion and sponsorships. National Authority on Tobacco and

Alcohol was established under this Act. The Act also authorizes the Minister of Health to issue regulations under the law. Under the section 30 and 34 of this Act an extraordinary gazette Notification No. 1770/15 dated 8th August 2012 had been issued by the minister. This specific regulation introduced pictorial health warnings for the first time in Sri Lanka, stipulating that not less than 80percent of the packaging of every cigarette, parcel or light cardboard box containing cigarettes must be printed on the surface. CTC filed a writ petition before the Court of Appeal against the publication of this gazette notification. (*Ceylon Tobacco Company PLC V Hon Maithripala Sirisena, Minister of Health and others, [2012]*) The Court of appeal gave the decision to display pictorial health warnings 50 percent-60 percent of the surface and 40 percent to trade mark. After this case the regulation has been amended by gazette number 1797/22 and 1864/32. The Amendment to the Act was passed in March 2015. It increased the size of pictorial health warnings to 80percent. In September 2016, Minister issued Gazette no 1982/33 prohibiting the manufacture, importation, and sale of smokeless tobacco products, e-cigarettes containing tobacco, and cigarettes that are flavored, colored, or sweetened.

The Chairman of NATA has been issued guidelines on the 1st of September 2020 to Medias to prohibit smoking scenes in television programs. By above mentioned laws the government has banned advertising and promoting tobacco products by domestic TV & Radio channels, Newspapers, Internet communications, outdoor advertisements, free distribution etc. It is allowed to sell direct person to person, brand sharing, retail incentive programmes and commentary against misleading promotions.

But one can observe the absence of a legal framework for the *beedi* industry. The lack of provisions for the *beedi* also means that *beedi* bundles being sold are not required to carry any form of health warning labels which cigarette packs must carry by law.

In March 2021, CTC has introduced a cinnamon cigarette to the market. Cinnamon is a spice and ayurwedic herbal which good for health. However, introducing cinnamon cigarettes seems to be a strategy to attract people to smoke. According to ADIC, tobacco companies trying to use loopholes of the laws to survive there losing market (ADIC, 2021).

IV. CONCLUSION AND SUGGESTIONS

Sri Lanka has made progress on tobacco control in recent years. However, people continue to die and become sick due to direct tobacco consumption and second-hand smoking. Government can still do more to make the proven tobacco control tools work for its citizens' wellbeing.

Tobacco companies are passing Tobacco taxes on to consumers by including same on and in cigarette prices. High prices can be recognized as one of effective strategies which discourage tobacco smoking. Taxes can benefit smokers who quit, reduce the overall consumption of tobacco, and put smoking cessation on their radar of those who continue to smoke. Increasing taxes also have a positive impact on non-smokers by reducing their exposure to second-hand smoke.

A regulated tobacco tax policy cannot be identified. However, due to high price of branded cigarettes might influence the smokers to find some alternatives which might be more dangerous. The rise in *beedi* consumption and illicit cigarettes provide ample evidence for that. Introducing regulated tobacco tax policy and apply equivalent taxes to all tobacco products to minimize the incentives for tobacco users to switch to cheaper brands or products in response to tax increases. Government should take necessary actions to establish more controls on illicit cigarettes and tobacco products which are imported to the country.

Majority of the smokers had apparently seen the Government warning on cigarette packages, however, there is no cogent evidence to show whether such warning labels were effective in changing the desires and intentions of smokers. As per the existing research, they only have seen the pictorial warnings. Government legislation of health warning on cigarette packages was not very much affected by the reduction of tobacco smoking. (Fernando et al., 2019) However, it is immature to argue that packaging labelling make no effect in reducing tobacco use prevalence without proper evidence. Therefore, there is need for adequate research on whether pictorial warnings are a factor in the decline in cigarette use. The legislators and relevant stakeholders should encourage conducting more tobacco research and to identify the most effective method to convey the end user about the government's message.

Prevention is more important than estimating the loss from the event. Awareness programs on smoking cessation can be carried out at the school and community level, targeting the youth community between the ages of 15 and 20. It is essential to be aware from the beginning so as not to fall prey to the machinations of the tobacco companies. Government should focus on *beedi* industry as well. It should be monitor under NATA and taxes should be apply on not only cigarette production. It is time that relevant Government entities identify and close the loopholes that exist in the legal system that allow *beedi*.

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AUTHOR BIOGRAPHY

The author is a final year law student at the Department of Legal Studies, Open University Sri Lanka and Audit officer of State Audit Service. She holds BSc (Business Administration) from University of Sri Jayewardenepura. Her research areas are data protection, forensic audit, performance audit.

Do Companies Commit Felonies? A Legal Analysis on Corporate Criminal Liability

AP Rathnayake

Faculty of Law, General Sir John Kotelawala Defence University, Sri Lanka

ayodhya.rathnayake@kdu.ac.lk

Abstract - The Corporate Social Responsibility (CSR) is a guiding light to the companies in the process of protecting human rights. Although the concept CSR is supportive in the maximization of profits while addressing the societal expectations, the companies are often involved in the infringement of rights of the people and the surrounding environment. Such infringements have brought forth the idea of Corporate Criminal Liability. The acts committed by companies which become detrimental to the society can be identified as crimes, but controversies exist regarding the imposition of criminal liability on such acts. The author's attempt in this study is to analyse the contexts in jurisdictions namely United States of America (USA), United Kingdom (UK) and India in relation to the recognition of corporate criminal liability. This study identified that the Sri Lanka's company law does not provide adequate remedies to the injustice caused by the company operations. This has been considered as a loophole in the domestic legal framework. The study further recommends the enactment of a separate legislation on corporate crimes by taking Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) as an example. CMCHA is of significance since it imposes criminal liability on companies for causing death of people. The methodology of this study is normative and qualitative in nature. The use of primary and secondary sources of law in the research has resulted in a comprehensive comparative analysis.

Keywords— *company, corporate criminal liability, human rights, infringement*

I. INTRODUCTION

The companies which operate in Sri Lanka contribute to the economic development in a great deal. The economic development which is achieved through the contribution of companies extended to the upliftment of the Gross Domestic Production (GDP) of the country and the provision of employment opportunities to the public. With the development of such contributions to the economy, the companies have been granted with the honour of separate legal personality. This situation has involved in providing legal exemptions to the companies.

The Corporate Social Responsibility (CSR) is a concept which deals with the companies and guides the way to protect the human rights and avoid infringements of laws. The present version of CSR stands to the creation of profits, while working for the societal expectations. (Crane, Mitten & Spence, 2014). This does not prove a sufficient solution to the companies which commit serious crimes. It is apparent that, most companies in Sri Lanka have engaged in different types of offences which ultimately influence the public in a negative manner. Jankowska (2016) brings forth an opposing argument on the corporate criminal liability which signifies that an individualistic notion of responsibility cannot be imposed on a company. But, this contention does not prove perfect truth. A company stands to an entity entitling rights and obligations, with a legal capacity. If the bad action of a company affects the societal expectations, such an action attracts repercussions (Adeyeye, 2012). Thus, it can be justified that, a company incurs culpability in relation to the offences of pollution and financial irregularities etc. The study consists of two main objectives namely the identification of the incidents of human right violations result due to company operations and the recommendation of a new legal framework to introduce corporate criminal liability.

A. Criminal jurisprudence

Satria (2018) explains the perceptions of Von Savigny and Hans Kelsen. As per the view of Savigny, the personality is with the humans, and making the companies liable over the crimes is problematic. Kelsen upheld the preservation of the principle of criminal law; *societas delinquere non potest* (a corporation can not commit a crime). The grounds propounded by Savigny and Kelsen were subordinated by the view of Granville Williams.

William's contention in this regard was different, where he saw the evolution of corporate responsibility as a result of the judicial evolution. The very perceptions emerged in the history have already been eroded and now entrusted the companies with the wide purview of duty of care.

II. METHODOLOGY

The methodology in this study is qualitative in nature. The author has analysed primary and secondary sources of law including the domestic legislations & the enactments of foreign jurisdictions. The analysis of case law jurisprudence is predominantly considered throughout the study. Further, the author has adapted a comparative approach while analysing the jurisdictions of United States of America (USA), United Kigdom (UK) & India.

III. RESULTS & DISCUSSION

A. United States of America (USA)

Doyle (2013) states the very perception that companies are unable to commit the felonies but committed by the individuals is outdated. It has clearly been accepted that, the criminal liability can be imposed on a company on two major grounds namely nonfeasance and malfeasance. Nonfeasance stands to an instance where the company is failed in the fulfillment of obligations which are legal. Malfeasance stands to the inadequacy of the performed obligations legal in nature. In New York Central & Hudson River Railroad Co v. United States 212, US, 481, 494-495, the Supreme Court's view was that, there are situations which exempt the corporations from liability due to the fact that, corporations are unable to commit such offences. Contrary to this, it is apparent that, there exists a class of offences which clearly amount to the contravention of legislations. The Supreme Court of USA emphasized that, the exemptions granting to the corporations from the criminal liability, impliedly support the circumvention of justice permitting certain acts to remain unpunished. Thus, the enactment of a legislation to regulate corporate crimes facilitates the corporate persons to refrain from violating the law. As Beale (2013) states, the Corporate criminal liability in USA arose as a result of the industrial revolution and the increased corporate activities. The USA justifies the imposition of corporate criminal liability due to the expansion of companies and the wielding power. A certain extent of negative influence is exerted by the vastly expanded companies on the health, safety and the life of the citizens. When taken as a whole, there is an anticipatory risk to the economy of USA, by the constant misconducts of the companies. Thus, both the federal and state laws have recognized and justified the adoption of criminal liability connected to companies.

Muhwezi (2016) clearly explains the purposes of corporate criminal liability. The purpose in its predominance is knitted with the globally recognized principles of criminal law, which has the effects of deterrence and retribution. The deterrent effect has a positive influence on the companies in curbing the crimes with the incentives to monitor the deeds of the employees. Retributive effect does influence the wrongs of companies in a negative manner. The companies which profit from the illegal activities clearly exert a negative influence on the society. Retribution interferes in the imposition of fines on the companies which illegally benefit from the illicit transactions.

In USA, the Justice Department has the power to take decision whether it is apt to prosecute a corporation. The criteria used for the prosecution is based on the strength of the case, the historical record of the misconduct, compliance programme and the supportive nature to the investigation. In addition to the above facts, the law sees into the fact whether the corporation has made any restitution or taken any remedial measures. Doyle (2013). Further, there is a strong constitutional rights framework granted to the corporations. Thus, all the corporations are entitled to the right to free speech (under the 1st amendment), protection against the searches and seizures which are unreasonable (under the 4th amendment), right to due process and freedom from double jeopardy (under the 5th amendment), right to legal representation, fair and speedy trial (under the 6th amendment) and protection from excessive fines imposing (under the 8th amendment). The federal and state laws in USA have harmoniously accepted that the corporations cannot be imprisoned, but can be imposed a fine or subjected to the confiscation of property.

B. United Kingdom (UK)

The case law jurisprudence in UK has accepted that the criminal liability of companies. In Brentnall and

Cleland Ltd v. London County Council [1945] 2AII ER 552, the guilt of a company was accepted for common offences. This is further reiterated by R v. I.C.R. Haulage [1944] K. B 551.CA, where it was recognized that, a company can be held liable under statutory offences. Jankowska (2016)'s explanation on the emergence of corporate criminal liability in English Law does bear a similarity to the context of USA. Thus, according to Jankowska, the liability of companies was decided by considering the impact on the environment, food, justice and employment of the citizens. The industrial revolution granted corporations, the right to own property and selling goods (Berger, 2011). In most circumstances, the products produced by companies are tainted with the risks. The companies in return engage in the misconduct of falsifications and the continuous violations of laws in relation to environment, safety and health. One of the achievements in the context of corporate criminal liability in English Law is the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA 2007). The act introduced the offence of corporate manslaughter which constitutes a serious breach of duty of care by the companies. The gravity of the offence lies on the fact that the acts of companies harm and cause death of the people. The significance of the act is clear as at the instance of imposing the liability, which does not make any difference as to the victims (employees, servants or third parties). If the mismanagement of the company is apparent, that constitutes an offence under the act. The operation of CMCHA emphasized the obligation of companies to be responsible and cautious in the matters connected to the safety of people. As per the section 1 of CMCHA, the act requires the specific company to be a recognizable organization owing a duty of care to the public. Then, the company becomes liable upon the proof of the victim's death constituting a gross violation of duty owed.

The Bribery Act 2010 does perform a supportive function to the English Law on corporate criminal liability. The act specifically considers the management of companies. The company becomes liable on the failure to prevent the acts of bribery. The exception lies on the proof of adequate procedures to prevent such acts. The significance of the act is clear, as it has an extra territorial application to the English companies.

C. India

Judicial activism

Sahana & Arya (2018), state the Indian context of adapting the corporate criminal liability with the expansion of corporate sector with the advent of globalization and technology. The Indian Penal Code by it section 11 accepted that company includes in the definition of person. In Assistant Commissioner v. Velliappa Textiles Ltd (2003) 11 SCC 405, the view of the Supreme Court revealed that, the companies have become lethargic and knowing that there is no imprisonment, tend to commit crimes. This is seen as injustice, where the court allows a company to move passively and freely, even after the commission of a crime. Thus, the court justified the imposition of the criminal liability on companies. The case was overruled by Standard Chartered Bank v. Directorate of Enforcement AIR 2005 SC 2622, where the court held that, when the punishment to a specific crime becomes imprisonment, a company cannot exempted from the liability. A fine is seen as the substitution to the imprisonment.

The case law jurisprudence has elaborated on the fact that a company deserves punishment at the instance of a wrong doing. Granting of exemptions is not accepted. Iridium India Ltd v. Motorola Incorporated 2004(1) Mn LJ 532 elaborated that, either under common law or statutory law, the liability of a company is the same when compared to an individual. A company is driven by a person. Thus, in the simplest way, a company acts through a person. The court's view that, even if the company cannot be held liable for a certain act, the authority acting itself becomes liable. This view was accepted in U.P Pollution Control Board v. Modi Distillery (1944) 1AII E.R. 691. In this case, a company involved in the act of discharging waste water into a drain. This contravened the Water (Prevention and Control of Pollution) Act 1974. As per the court's perspective, the authority in charge of this conduct is liable even there is no prosecution against the company.

The Indian judicial perspective differentiated between the employees/ employers and company in the purview of corporate criminal liability. In Aneeta v. M/S Godfather Travels & Tours Ltd (2012) 5 SCC 661, the court's viewpoint was that, in an instance where the company is proved to be a criminal, no prosecution is maintained against the employer or employee. If such an individual is to be prosecuted, the specific criminal act involved must be carried out with the intention of benefitting the company.

The Indian law has recognized the offences which come under the corporate criminal liability namely

conspiracy, disobeying the court orders/ decrees, public nuisance, illegal practices of medicine, violation of consumer protection and antitrust laws, larceny, extorting money with false pretences, selling of obscene matters, violations of laws related to health and occupational safety.

Singh (2018) has identified that the corporate criminal liability is imposed on a corporation upon the fulfillment of two requirements namely, the act must be fallen within the purview of the employment and it has the effect of benefiting the company.

D. The context in Sri Lanka

Sri Lanka does not possess an established legal framework for the corporate criminal liability. The situation in Sri Lanka is similar to USA, UK and India, where the growing economy and industrialization made the corporate sector more powerful. Simultaneously, Sri Lanka has experienced the behaviour of companies committing serious crimes against the public and environment. The situation in Sri Lanka is not optimistic in the context of investigation and the prosecution of the crimes committed by the companies. Zubair (2001) states that, the Environmental Impact Assessment procedure in Sri Lanka (as introduced by the National Environment Act No.47 of 1980) involves in the identification of the ventures of corporations or other projects which need review prior to the commencement. But still, the procedure is violated by the political interference and fabrication of data (Zubair, 2001). This circumvention from the accepted procedure does amount to the regulatory offences (Green 2006). This situation insists on the need to have a separate legislation to address the corporate crimes in Sri Lanka in addition to the legislations which are commonly applicable.

The controversies as to the making companies criminally liable are in existence. As previously discussed, it is in general belief that, a company does not have an individualistic notion of responsibility as a human possesses. In addition to this, the decision making structure of a company is always complex as there are several directing minds in the process of making decisions. Thus, the imposing criminal liability on companies is considered as difficult and problematic.

E. Justification for the introduction of a new legal framework

1) Companies threatening the public life and the environment: The corporate community is obliged to consider the overall interests of the public. (Hartley, 2008). In Sri Lanka, the companies have involved in the commission of crimes against the environment and the public in numerous ways. It is clear that during the last decade, a number of environmental crimes have been reported. Ravindra Gunawardena Kariyawasam v. Central Environment Authority & others (SC/FR Application No.141/2015) was recently decided by the apex court of Sri Lanka. The case being famously known as the Chunnakam case revealed a crime committed by a company. Northern Power Company Ltd being the respondent of the case has operated a thermal power plant which caused the pollution of ground water of the area. The ground water was unfit for the consumption. His Lordship the Justice Prasanna Jayewardene delivering the landmark judgment of the case identified the suitability of applying the polluter pays principle where the company was ordered to pay Rs.20 million of compensation to the villagers in Chunnakam where each chief occupant was entitled to Rs. 40.000 from the company. In addition to the Chunnakam Case, the public protests were directed to a crime committed by a company in Rathupaswala area, Sri Lanka. As Bulathsinhala & Thoradeniya (2018) explained, the ground water of Rathupaswala area was contaminated with the effluents discharged from a latex glove factory; Dipped Products PLC, which affected the PH level of water as intermixed with acids. This was considered as one of outrageous incidents in Sri Lanka, ended up with public clashes and untimely deaths. The inception was at the factory which operated with utmost negligence over the lives of the people and the environment, while discharging toxic chemicals. This incident resembles the very situation in Kelani River which was polluted by the discharge of diesel from the Coca – Cola Company, which was multi- national in nature. This amounts to the contravention of the right to water of millions of people in Sri Lanka.

2) Omissions in relation to the safety of the workers: It axiomatic that, the companies work with the utmost aim of the maximization of profits. The companies are entitled to provide protection to the employees. As Philipsen (2009) observed, the employers have an obligation to invest in safety and health precautions. In Sri Lanka, it is clear that, the companies have worked in such a manner to avoid the concern on the safety of employees. This is further emphasized by the tragedy happened in a rubber factory in Horana. A worker was fallen in to a

tank collecting ammonia waste. The worker has confronted the tragedy in the course of his employment while attempting to clean it. The death of the worker is considered as a consequence of the evasion of company's basic obligation of providing a conducive environment to the employees with sufficient safety and precautions.

3) Contravention of the right to health and life of the public: Minkes & Minkes (2008) identified that, corporate crimes become directly influential on consumers where their health and safety are at a risk. (Sri Lanka Medical Association 2015) has identified the category of food born diseases cause due to the presence of chemical contaminants and bio toxins in the ingested food. The negligence of companies as to the food safety does amount to the violation of Food Act No: 26 of 1980. It is clear that, the recent case of Edna Chocolate Company is the best example for this. The company was charged for utilizing melamine contained milk powder in the productions, which had a serious impact on the health of children. Gossner et el (2009) state that, the melamine brings forth negative health effects namely kidney, urinary tract effects and kidney stones. This shows the fact that, the company manufacturing chocolates has committed a grave offence against the public and the children.

IV. RECOMMENDATIONS

The Companies Act 2007 being the substantive law on company matters does not address the issues of the crimes and imposition of punishments. As revealed by this study, there exists a necessity for the separate legislation on corporate crimes. Thus, the report proposes to enact a legislation which has its resemblance to the Corporate Manslaughter and Corporate Homicide Act 2007 in UK. The significance of the act is that it makes a company liable to the death of the people. It is obvious that, in Sri Lanka, the companies involved in the criminal behaviour harming the life of the people, environment and also the tough negligence on the industrial workers. Thus a legislation which makes the companies directly liable and imposing sanctions is imperative. The purview of the proposed legislation should be extended beyond that of UK by including serious offences. This is further to be incorporated with the remedial orders and public orders.

The environmental crimes committed by the companies are grave in nature. Thus, it is recommended that, the corporate criminal liability is extended not only to the company as an entity but also to the profits derived by the ventures deteriorating the environment.

The right to life and right to a healthy environment deserve to be enshrined in the chapter III constitution of Sri Lanka as fundamental rights. Generally, the access to the Supreme Court of Sri Lanka is given under Article 126, to redress the infringements of fundamental rights by the government. The report recommends to effect an amendment to the constitution of Sri Lanka that, the purview of article 126 to be extended to the actions of private companies in the context of the violations of the right to life and right to a clean and healthy environment.

As the Indian judicial activism in Assistant Commissioner v. Velliappa Textiles Ltd (2003) 11 SCC 405 explained, the companies should not be allowed to walk freely without facing a punishment for the crimes. Thus, the imposing of punishments to the companies is recommended while differentiate it from the individual liability of directors. Further, as Gobert & Punch (2003) described, the organizational fault has the effect of supplementing corporate liability.

Enhancing the framework of corporate governance in companies. Muchlinski (2007) identified that, the avoidance of environmental pollution by the companies experienced through eco- efficiency developed by the sound environmental management practices. It must be realized by the companies that, there are responsibilities than the making of profits. (Zerk, 2006).

V. CONCLUSION

The companies in Sri Lanka commit serious offences against the public and environment. Sri Lanka does not possess an effective legal framework to impose corporate criminal liability. The report suggests the recommendations to the enactment of a separate legislation to make companies liable for the deaths and the grave crimes. Further, recommends on the constitutional amendments for the recognition of rights and extending the purview of Article 126 of the constitution.

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AUTHOR BIOGRAPHY

The Author is a Lecturer (Probationary) at the Faculty of Law, Sir John Kotelawala Defence University. She is a LLB graduate and a Lawyer by profession. She holds a Masters of Law specialized in IP & IT Law from United Kingdom. Further, the author has studied Forensic Medicine at the University of Peradeniya.

Challenges of Law Related to Indigenous Medical Research for Drug Innovation in Sri Lanka in the Context of the New Normal: A Critical Analysis

KPIA Kiriella

Faculty of Graduate Studies, General Sir John Kotelawala Defence University

fgs-401law20037@kdu.ac.lk

Abstract - With the prevailing condition of the world, the World Health Organization (WHO) activated a blueprint for research and development for accelerating diagnostic, improving coordination between scientists and global health professionals, research and development process, and therapeutics for severe acute respiratory syndrome Coronavirus 2 (Covid-19). The humans who have been infected and are suffering from chronic illnesses and elders are at a high risk of fatality. Therefore, human immunity power boosting is the best solution to fight Covid-19. With this atmosphere, the world's attention was drawn to indigenous medicine to innovate a cure. In Sri Lanka, a controversial situation has arisen on the traditional treatment for enhancing immunity, questioning uniformity, and transparency. Considering the medicine production procedure, there should be adapted standards unless neither the doctors will recommend, nor people will trust and consume the medicine. The objective of this study is to find the reasons for the controversial issues that occurred when the traditional cures were introduced in Sri Lanka. This study explored the relevant laws and their defects and how to adapt all indigenous medical practices to one formula regarding drug innovation of indigenous medicine and the authorities who are responsible for drug innovation of indigenous medicine. The researcher followed a systematic literature review method to analyze the provisions of Ayurveda Act No. 31 of 1961 (hereinafter referred to as "Act") and regulations as well as other relevant documents.

Keywords— indigenous medicine, research, responsibility, authorized bodies, Ayurveda Act

I. INTRODUCTION

Covid 19 is a virus that is not cured by any available drug. This virus can spread from droplets that are generated from coughing and sneezing, among humans, and rapidly converted according to the environment in which it formulating. The virus can be affected not only the respiratory system but also the cardiac, renal, brain, eyes, gastrointestinal, skin, and psychologically. This is a virus that can fatal any person having a weak immune system. The WHO has taken steps to implement the vaccination program worldwide months later. (WHO, 2021) The vaccine artificially enhances immunity. The vaccine is belonging to an allopathic medical system among the various medical practices across the world deviate from allopathic medicine and there is an Ayurvedic medical system in Sri Lanka. (WHO, 2019). Although it is generally referred to as ayurvedic medicine, it is a combination of Ayurveda (which came from Hindu Veda treaties of India),Siddha (from Indian religion and culture), Unani (originated in ancient Greece, and now practicing in India), and Deshiya Chikitsa (Sri Lankan traditional treatment). Sri Lankan traditional treatment or medicine is inherited with its own remarkable indigenous knowledge system as evident by its impact on the earlier inhabitants (Medicine, 2013). In 341 AD King Buddadasa's "Sarartha Sangrahaya", the first medical treaty in Sri Lanka, which was contained the ethnicity and medicine of "Hela". This knowledge comes through passing the evolutionary process which has evolved in the cultural environment and that has been a transmission from generation to generation (A.D. Zoysa, C.D. Palitharathna, 1992). (CK Gamage, 2019).

The Covid-19 pandemic was impacted Sri Lanka from March 2021. Sri Lankan Traditional Medical Practitioners(TMP) are also trying to contribute their knowledge to innovate the cure. Although there are authoritative bodies to help and direct them, citizens of Sri Lanka witnessed that the health authorities

tried to legalize the cures without clinical trials or even without acknowledge of ingredients containing in the introduced drugs. Therefore, it is punctual to find out why the National Medicine Regulatory Authority, Ayurvedic Medical Council, or Ministry of Indigenous Medicine pr any responsible authority did not come forward to regulate this situation.

II. OBJECTIVES.

There is a comprehensive legal framework to regulate and observe every aspect in relation to drug innovation under National Medicine Regulatory Authority Act no. 5 of 2015in Sri Lanka. Despite all rules and regulations, there couldbe able to see the controversial situation that arose in Sri Lanka with the syrups introduced by many persons without the approval of any responsible authority, while the western practitioners submitted their research proposals to the National Research Council of Sri Lanka. (Jayasiri, 2020) None of them reveal the all ingredients of the syrup and they started distributing among the people for free and sell later. However, the Sri Lankan government or any authoritative body did not interfere to stop that immediately.This is a very problematic situation just in case if the syrupimpacts negatively on the human, then the ayurvedic or allopathic doctors will not be able to give treatments without knowing what was in the syrup. In addition to that many medical professionals have tried to adapt TMPs to the accepted methodology by pointing out the deficiencies of the methodology in which these drugs were introduced, these TMPs who introduced the cure have arbitrarily rejected those ideas. The TMPs are breaching their existing contractual liability with the patients. It is not uncommon for cases to extend beyond the civil liability to criminal liability. While the experts were up against the syrup, some responsible authorities including the Ministry of Health, believed that the syrup should be approved. (Bandara, 2020) However, the Health Minister, who consumed the Covid syrup, was positive for Covid-19. (BBC, 2021)

When Sri Lanka is making such futile efforts, with the recognition gained on the results of clinical trials conductedsince 2000, the World Health Organization allows scientifically proven traditional medicine for Covid-19.(WHO, 2020)

Thus, it is very clear that although there are laws and regulations in this regard, in Sri Lanka such as the NationalMedicine Regulatory Authority, there should be some reasons for not being functional. The reasons may be a flaw or a weakness of the laws and regulations. There is a requirement to identify what are the loopholes in the law, that allows them to do so. These are the research question I used for that. What are the relevant laws and the defects ofrelevant laws? how to adapt all indigenous medical practitioners to one formula regarding drug innovation of indigenous medicine and what are the authorized bodies have responsible for drug innovation of indigenousmedicine?

III. DISCUSSION CONCLUSION

The WHO identified key objectives of the Traditional Medicine Strategy in 2005, aims to support member states, to integrate traditional medicine within national health care systems, where feasible, by developing implementing national traditional medicine policies and programs, to promote the safety, efficacy, and quality of traditionalmedicine by expanding the knowledge base, and providing guidance on regulatory and quality assurance standards, to increase the availability and affordability of traditional medicine, with an emphasis on access for poor populations,to promote therapeutically sound use of appropriate traditional medicine by practitioners and consumers in South - West Asia Region. (WHO, 2013). Simultaneously, Sri Lanka also had been a party to the Delhi Declaration onTechnical Matters of Traditional Medicine (Delhi Declaration). Regional Committee is willing to support member states to the promotion of national policies for equitable development and appropriate use of traditional medicine in health care delivery; to development of an institutionalized mechanism for information exchange; andto exchange of views, experiences, and experts forintegration of traditional medicine into national health systems in accordance with national policies and regulations (WHO, 2014). WHO launched the Implementation of Global Strategy and Plan of Action on Public Health, Innovation, and Intellectual Property in 2015 for the development of indigenous medicine (Sri Lanka, WHO, 2015). The protocol for phase III clinical trials of herbal medicine for Covid-19 has been endorsed by Regional Expert Committee on Traditional Medicine forCovid-19 established by the WHO Africa Centre for Disease Control and Prevention, and the African Union Commission for Social Affairs. Additionally, a charter and terms of reference for the establishment of a data and safety monitoring board for herbal medicine clinical trials. (WHO,2020). The African government adopted the

resolution of the WHO Regional committee as a member country and implemented from the year 2000 and undertake relevant research and require national medicines regulatory agencies to approve medicines in line with international standards, which include the product following a strict research protocol and undergoing tests and clinical trials. There is a piece of evidence for research going in the unity of four countries on herbal medicine. (Dâmaris Silveira, Jose Maria Prieto-Garcia, Fabio Boylan, Omar Estrada, Yris Maria Fonseca-Bazzo, Claudia Masrouah Jamal, Pérola Oliveira Magalhães, Edson Oliveira Pereira, Michal Tomczyk, Michael Heinrich, 2020).

With this background, need to look at the Sri Lankan context. In Sri Lanka, the Government College of Indigenous Medicine was established in 1929. In 1961, theAyurveda Act No. 31 of 1961 was enacted by repealing theIndigenous Medical Ordinance No.17 of 1941. The Ayurveda Act intended to provide for the establishment of an ayurvedic medical council to register ayurvedic practitioners, ayurvedic pharmacists, and ayurvedic nurses, and deal with matters relating to their professional conduct;for the establishment of as ayurvedic college and hospital board to discharge certain functions in relation to the college of ayurvedic medicine, the central hospital of Ayurveda and the pharmacy, herbarium, and dispensary attached thereto; for the establishment of an ayurvedicresearch committee to discharge certain function in relationto research in Ayurveda. This Act is the main area that should investigate to find why it is not coming into operation in this controversial situation.

Paragraph (b) of section 18 of the Ayurveda Act No.31 of 1961 as amended, provides for the registration of ayurvedicpractitioners. As a basic law relating to indigenous medicine, under Section 11 (1) of the Ayurveda Act constituted an Ayurvedic Medical Council (AMC). AMC is the authoritative body for the registration of ayurvedic medical practitioners according to Section 18 of the Act. However, the AMC is constituted including not more than three members appointed by the Minister, persons who are not registered as ayurvedic practitioners according to section 11(1) (f) (i), out of seventeen members, and at least three from the members of the All Ceylon Ayurvedic practitioners' Congress. Although one can argue this amount out of seventeen is a very small percentage, according to Section 16 quorum of the council is six. They can register the practitioners on the authority of Section 18(b) and make rules for the Regulation and control of the professional conduct of ayurvedic practitioners and any of the matters referred to cancellation, or suspension of such registration. According to this structure of the Ayurvedic Medical Council, it seems that the Act itself allows the emergence of unregistered traditional practitioners. Part VII of the Act provided the provisions for the registration of ayurvedic practitioners *inter alia.* There is a general register and a special register. Section 55(1)(e) provides Sri Lankan citizens who have sufficient experience and skill inany particular branch of Ayurveda can be registered in thegeneral registry and non-registration is an offence according to Section 69(3). If all TMPs are registered AMCwill no longer exist. This conflict between Section11(f) and Section 69(3) of the Act constitutes *exclusive ad invicem*.

The Registered Ayurvedic Medical Practitioners' (Professional Conduct) rules issued by the Minister under Section 18, on 15.10.2014 from No.1884/36 ExtraordinaryGazette for manipulating the medical responsibility of ayurvedic medical practitioners. The responsibilities assigned to the medical practitioners of research and innovation of drugs and the production of drugs shall havecomplied with all applicable laws for the time being in force relating to the same. These rules are not strong enough to be enforced and there is a question of whether there are applicable laws for the time been. There is no recognized mechanism for implementation on the malpractices of the TMPs because of the interpretation clause of the gazette notification, these rules apply only to the registered ayurvedic medical practitioners. As well as there is no provision to punished irresponsible acts ofTMPs. That may leads to malpractices.

There is a provision for refusal of the registration on the grounds that, he has been convicted by a competent court of any offense which shows him to be unfit to be such practitioner, he has guilty of any misconduct in his capacity as such practitioner in Section 57 of the Act. However, this provision could not impact the unregistered TMPs since the entire Section dealt with registered practitioners. The Act also does not provide a clear definition of "any offense which shows him to be unfit" or "any misconduct". Therefore, the legal authorities could not be able to TMPs take into the regular legal framework. There must be included the clear definition for"any offense which shows him to be unfit" and "any misconduct" in the Act.

Order No.6 of Gazette Notification No.1884/36 of 2014 issued by the Minister stipulates that Ayurvedic Medical Practitioners who engage in the production of Ayurvedic drugs shall comply with all applicable laws for the time being in force. Even so, no regulations have been devised by the minister for how to conduct or what is the accepted methodology of the research in indigenous medicine although there is an Ayurvedic Research Committee. Compared to the way allopathic medicine is being researched, no accepted uniform methodology can be found in traditional medical research. Part V of the Act provided provisions for the establishment of The Ayurvedic Research Committee (ARC). Section 41 of the Act conferred the duties to the committee as follows; to advisethe Minister as to the carrying out of research in all branches of Ayurveda for, ayurvedic literature; fundamentals in ayurvedic doctrine; ayurvedic clinical treatment and ayurvedic drugs, pharmacology, and pharmacopeia. The scope of ARC should not be limited tothe advice. The additional power can be added to ARC to make rules and regulations on research methodology. If there were such by-laws TMPs drug innovations can be taken into the legal framework. The Bandaranaike Memorial Research Institution (BMRI) of Ayurveda is theonly institution that, established outside of this Act, is accommodated to research new drugs using traditionalknowledge. However, there are no pieces of information available about the ongoing or completed research of BMRI on cure for Covid 19.

The notion of the prescriptions or the formulas of traditional medicine have been time tested and need not be researchedis unacceptable on two grounds in the present context. Since those formulas are hereditary and they cannot be avertimented from change with the individual affiliation in a timely manner. On the other hand, if the constituents of herbs change according to chemicals and environmental changes, it will affect the drugs produced by those plants. Therefore, an argument of time-tested can be ruled out. (P. Ahamadpour, F. Ahamadpour, T.M.M.Mahmud, Arifin Abdu, F.Hosseini Tayefen, 2014)

There is an Ayurveda Pharmacopoeia which was documented raw materials and medicinal system by the Department of Ayurveda. Sri Lanka Ayurvedic Drugs Corporation was incorporated under the State Industrial Corporation Act No.49 of 1957 and the private institutions (including most of the practitioners) manufacturing the ayurvedic drugs according to Ayurveda Pharmacopoeia and they do not try to do research for drug innovation.

In 2015, the legislature of Sri Lanka passed Act No.5 to repeal The Cosmetic, Devices and Drugs Act No 27 of 1980, and provide for the establishment of the National Medicines Regulatory Authority (NMRA) which shall be responsible for the regulation and control of, registration, licensing, manufacture, importation and all other aspects pertaining to medicines, medical devices, borderlineproducts and for the conducting of clinical trials in a manner compatible with the national medicines policy. There had been established National Medicines Quality Assurance Laboratory to ensure the good quality of the medicine. It is a comprehensive law regarding drugs in Sri Lanka. The NMRA has the power to encourage the manufacturing of good quality medicines in Sri Lanka witha view to assuring the availability of essential medicines ataffordable prices and regulates all matters pertaining to conduct clinical trials. The appropriate regulations with regards to the manufacturing and clinical trials published in2019 and part II of the Gazette provide how to manufacturethe drugs. (Gazette, 2019) But this law is also silent whenthe TMPs introduced their Covid syrups. Section 146 of theNational Medicines Regulatory Authority Act, "Medicine" interpreted from the interpretation clause *inter alia*including a product made out of medicinal herbal extract but excluded an Ayurvedic or Homoeopathic medicine. Therefore, the National Medicines Regulatory Authority Act does not have the capacity to interfere and control the acts of TMPs. There should be enacted a comprehensive and absolute law pertaining to indigenous medical research.

The project report related to Sri Lanka in 2015, which is linked together with the World Health Organization has revealed several facts on this issue. (Perera, Pathirage Kamal, Manisha Shridhar, 2015). According to the AnnualReport of AMC 2017, there are 8908 traditional ayurvedic medical practitioners out of 23206 ayurvedic medical practitioners. TMPs practicing medicine who are having secret formulae received from their ancestors apart from registered physicians at the Ayurveda Medical Council. The report (Perera, Pathirage Kamal, Manisha Shridhar, 2015) suggested preserving these manuscripts for future research to develop health products through digitalizing and outlined from India as an ensample. The TMPs in Sri Lanka hesitate to reveal their secrets formulae or prescriptions which had been inherited from their ancestors. And traditional medicine may

die because it is passed down from generation to generation unless taking the measure toprotect the intellectual property rights of the TMPs. The existing literature review on Current Status and Challengesin Research and Development on Traditional Medicine in Sri Lanka identified current states and challenges. (Perera, 2019). When we discuss the intellectual property rights of the indigenous medical practitioners, there is a question of whether TMP's intellectual property rights are protected in Sri Lankan Law? Although Sri Lanka had been signed the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Sri Lanka did not implement concerning the indigenous part through the Intellectual Property Act No. 36 of 2003 although having section 24 forsui generis form of expression of folklore, according to the interpretation clues. Therefore, Sri Lankan Traditional Medical Knowledge cannot be included for that. This leadsto endangering the intellectual property rights of TMPs. Therefore, TMPs are reluctant to publish the prescriptions they have researched.

Existing literature on "Traditional Medicine and Primary Health Care in Sri Lanka: Policy, Perceptions, and Practice" (Matgaret Jones, Chandani Liyanage, 2018) revealed that the conflict between western and TMPs and policies are required to reduce the gap between the two systems. (Arseculeratne, 2002)

The Ayurveda (Disciplinary) Regulation, 1973 was made under section 82 of the Ayurveda Act and there is no provision in relation to the TMP's research. Similarly,Medical ethics is also a theme that should draw attention to when discussing the challenges. Robert M. Veatch,emphasis that, professional ethics is to emerge as an independent discipline, it is as a special case of the universal norms of ethical 99ehaviour and not as a special professional ethic. (Veatch, 1972). In that sense, TMPs do not bound by "The Ayurveda (Disciplinary) Regulation, 1973".

The National Research Council (NRC) established according to the Section 2 of the National Research Council of Sri Lanka Act No.11 of 2016. This Act invites researchers in public sector, who are willing to do the research in science and technology. Therefore, no venue for TMPs to conduct their research even under this Act.

The issued National Assessment Report Sri Lanka by the World Health Organization on Implementation of Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property in 2015 revealed that Sri Lanka does not have drugs innovation capacity on allopathy, and the World Health Organization endorsed the WHO Global Traditional Medicine Strategy 2014-2023 to help for strengthening the research capacity in the traditional medicine of the member states. National Science and technical policy of Sri Lanka;2008, identified a lack of research and document of the scientific basis of indigenouspractices including traditional medicine. Comparatively assessed to the steps taken by WHO, Sri Lanka is unbaled to step up with them.

IV. CONCLUSION

For preserve traditional medicine, which is a very valuable medical resource in Sri Lanka, change or make laws need to be accordingly. The practitioners of traditional medicine must be adopted to the legal framework while protecting their intellectual property rights. For that purpose, Ayurveda Act No.31. of 1961 which is older more than 50 years, must be amended in line with the present requirements and as much as possible for the future with effect to the Intellectual Property Act No.36 of 2003. Thereafter, Sri Lankan Indigenous Medicine will be able toachieve full recognition of the World Health Organization with the implementation of WHO strategies and achieve the pathways to trade benefits of the world market.

The sole penal Section of the Act is Section 80. According to that Section, the fine is not exceeding five hundred rupees. First of all, there must be amend the penal Section of the Act possible to punishment can be imposed separately for each offence. In addition to that, should be enhanced the sentence on the offence of non-registration which referred to in Section 69(3). Section 11(1) (f) (i) should be amended accordingly to avoid the conflict between Section 69(3) and 11 (1) (f) (i) of the Act. The law become null and void and neglected by the people on account of such conflict. The appropriate and specific interpretation of "any offense which shows him to be unfit" and "any misconduct" referred to in Section 57 of the Act must be included.

That should be introduced a research methodology and provides the accepted research criteria. In addition to that, the intellectual property rights of the TMPs must be protected by making necessary amendments to the Intellectual Property Act. It would be more effective if thelegislature could bring in a new bill that has similar provisions to the NMRA with regard to indigenous medical research. Then only can be TMPs adapted into the legal framework and encouraging them to fulfill their responsibilities

and obligations on behalf of the patients aswell as protect their rights.

VI. AVENUES FOR FUTURE RESEARCH.

This study is limited to critically analyze the Challenges of Law relating to Indigenous Medical Research for Drug Innovation in Sri Lanka, in the Context of New Normal regarding the TMPs only on sources that are currently available within the period of travel restrictions due to pandemic situation. The same study can be extended with the interviews of expertise of the relevant areas. Therefore, many avenues will be open to future research for how to amend or create other affected areas of law, when researching Strengthening the Laws Relating to the Indigenous Medical Research for Drug Innovation in Sri Lanka.

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CONFLICT OF INTEREST

The author declares that no conflict of interest.

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AUTHOR BIOGRAPHY

Anuradhie Kiriella was a government servant at the Judicial Service Commission of Sri Lankafrom 1997 to 2004. She was called to the Bar in 2007 and is working as an Attorney-at-Law in private practice as a life member of the Bar Association of Sri Lanka. She received the Diploma in Forensic Medicine granted by the Department of Forensic Medicine in the Faculty of Medicine of the University of Peradeniya in 2018. She is studying Master of Laws in General Sri John Kotelawala Defence University in Sri Lanka.

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Development and Rights of Indigenous Communities: A Comparative Analysis of Sri Lankan Law and International Standards

BRSL Boraluwa#, DMNS Dissanayake and RMMY Ranaweera

Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka

#sachiniboraluwa@gmail.com

Abstract - With the increasing emphasis placed upon the necessity of carrying out developmental activities, the states have a duty to take necessary measures to minimize the harmful effects on the environment as well as the indigenous communities. Indigenous people are recognized as distinct social and cultural groups that share ancestral ties to the land and natural resources which they live in. With the rapid development, indigenous people have become vulnerable of losing their habitats and cultures. Therefore, it is important that rights of these communities are protected. This research aims to ascertain whether the prevailing legal system in Sri Lanka is adequate to protect rights of the indigenous community when compared to international standards regarding development. The study further recognized the loopholes within the Sri Lankan legal framework regarding violation of rights of indigenous people due to developmental activities. The research was carried out using the Black Letter approach and relevant primary and secondary sources and as a comparative analysis between Sri Lankan and International standards. The study concludes that the Sri Lankan legal system is inadequate to address the issues faced by indigenous communities due to developmental activities which violate their rights, and thereby recognizes the importance of adapting from international standards to the Sri Lankan legal system to protect rights of the indigenous community while adhering to sustainable developmental measures.

Keywords— *indigenous people's rights, sustainable development, Rambakan Oya land acquisition project*

I. INTRODUCTION

"Human kind of one generation holds the guardianship and conservation of the natural resources in trust for future generations, a sacred duty to be carried out with the highest level of accountability" - Shiranee Thilakawardana, J- [*Wattegedra Wijebanda vs. Conservation General of Forest and others,* (2009)]

Environment plays a significant role for the survival of human beings. Both humans and the environment has an unbreakable balance which is essential for such survival. But, with times changing development has become an inevitable aspect of life of the human beings. In the recent years, these developmental activities have affected the environment in a harmful manner. This has become a major problem throughout the world. When considering about Sri Lankan situation, it can be observed that due to the rapid development at present, the harm done to the environment has been escalated. Several such examples are Uma Oya Hydropower project, Port City project and Central Expressway project.

Harms done to the environment affects directly to the human beings as they are dependent upon nature. Thus, it violates the basic human right to a clean and healthy environment. Every human being has rights which are inherent to them. But, indigenous people have special rights which are related to the environment as they have a spiritual and cultural connection with the environment. Therefore, right to environment of the indigenous community plays a significant role in their culture. However, in Sri Lanka it can be observed that this aspect has not given proper recognition when conducting developmental activities. The most recent example for this lack of recognition is the Rambakanoya – Pollebadda Land Acquisition project.

Therefore, this research aims to perceive whether the existing laws in Sri Lanka are adequate to protect the rights of indigenous communities against adverse developmental activities. The Sri Lankan legal framework is compared with the existing international standards in order to recognize the shortcomings of the Sri Lankan framework to address this issue.

II. METHODOLOGY

The research was carried out as a library research adopting the black letter approach. Black letter approach was adopted because effective access to empirical data was challenging due to prevailing pandemic situation in the country. It was conducted by collecting data through primary resources such as relevant legislations, international conventions and judicial decisions and secondary resources such as research articles, books with critical analysis, journal articles and other electronic resources. This research was carried out as a comparative analysis between Sri Lankan legal framework and the international standards. International standards were selected due to its comprehensiveness and accuracy in addressing the issues of the indigenous community, thus enabling these standards to be adapted in to the Sri Lankan legal framework.

III. VIOLATION OF RIGHTS OF INDIGENOUS COMMUNITIES DUE TO DEVELOPMENTAL ACTIVITIES IN SRI LANKA

Indigenous people are recognized as natives of a State who are culturally distinct. They practice unique traditions and retain social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live in. (United Nations Permanent Forum on Indigenous Issues, 2021) Indigenous communities are spreaded all around the globe. These native or indigenous people who are spreaded around the world are the descendants of people who inhabited a specific geographical region when people of different cultures arrived. These new arrivals later became dominant than the previous inhibiters.

Indigenous Community in Sri Lanka is known as 'Veddas'. According to Mahawamsa, Veddas are the descendants of Vijaya and Kuweni. (Ceylon Government, 1912) But archeological evidence and research findings disagrees with this statement. 'The ancestors of Veddas at one time ranged from South Australia to India, when these lands were part of one vast South-eastern Lemurian continent."' (Spittel, 1957)

In past, Veddas have been scattered around the Island but now, most of them have blended in with the Sinhalese and Tamil communities. The Veddas are divided into three regional groups (the Bintenne Veddas, the Anuradhapura Veddas, and the Coast Veddas) whose members have little or no contact with one another, although they acknowledge a remote kinship (Road Development Authority, Ministry of Higher Education and Highways, Government of Sri Lanka for the Asian Development Bank, 2017) At present majority of Veddas live in Eastern Province. 'The towns closest to the Vedda settlements are Maha Oya to the east and Mahiyangana to the west.' (Amarasekara, 2017) By 2017, the estimates of Vedda populations were between 5,000 to 10,000 (Road Development Authority, Ministry of Higher Education and Highways, Government of Sri Lanka for the Asian Development Bank, 2017)

With the development over the years, Veddas have gradually shifted from their original ways of living such as hunting and moved on to economic activities such as cultivation and trade. With this new background Veddas at present are facing various difficulties in order to survive. Of the major difficulties Veddas face at present, the difficulties faced as an impact of the developmental projects takes a prominent place. Some of the development projects which affected immensely to the Vedda Communities are Mahaveli irrigation and agricultural extension project, post Tsunami development projects, post conflict development projects, Rambakan Oya irrigation project and various road development projects. 'As described in the historic context of the Veddas, the Mahaveli development project resulted in fragmentation of the Vedda settlements leading to complete alteration of the culture, traditions, livelihoods and way of life of the resettled communities, mainly in the Dimbulagala and Henanigala areas.' (De Silva and Punchihewa, 2011) 'The identity of the Veddas is inextricably linked to the forests and the land, which is integral to the social, livelihood and spiritual life of the community.' (A Joint Civil Society Shadow Report to the United Nations Committee on Economic Social and Cultural Rights, 2017) But, at present the steps taken by State for regulation of lands and forests has had an adverse impact on the Veddas.

The recent acquisition of land in Rambakan Oya forest reserve for private investments has resurfaced the difficulties faced by Veddas due to the Developments within the country. They are once again threatened with losing their lands and livelihood due to the actions of the State. 'The chief of Wannila eththo (Veddas or forest dwellers) and the Center for Environmental Justice filed a petition recently in the Appeal Court of Sri Lanka against the clearing of 500 hectares of land in Pollebedda-Rambakan Oya area.' (Perera, 2021) The petition claims that Mahaweli Development Authority had

begun a project on land to cultivate Maize without conducting an Environmental Impact assessment. 'Petitioners state that the livelihood of the inhabitants largely depends on the forest. They have limited access to health care facilities and largely depend on indigenous medicine prepared from various herbs, honey and other forest produces found in the area. Furthermore, fishing in reservoirs and collect bee honey are some of their traditional sources of income and engaged in traditional livelihoods, such as gathering wood to build their mud houses with thatched roofs.'*Uruwarige Wannila Aththo and others vs Central Environmental Authority and others* (2020)] By restricting and denying of the basic needs of the Vedda Community of the Pollebadda area, the State is violating the basic fundamental rights of the indigenous community.

IV. INTERNATIONAL STANDARDS APPLICABLE TO THE PROTECTION OF RIGHTS OF THE INDIGENOUS COMMUNITIES AGAINST DEVELOPMENTAL ACTIVITIES

The Indigenous and Tribal Peoples Convention, 1989 is an International Labor Organization Convention, which is also known as ILO Convention 169. It is the foremost binding international convention concerning indigenous peoples.

The Article 7 of the Convention discusses the right to participate in the formulation and implementation for national and regional development projects which affects them directly. In this context, the government is required to take measures in cooperation with them to protect and preserve the environment of their territories.

Article 14 requires the government to recognize the ownership and possession of the lands the indigenous people traditionally occupied. Furthermore, adequate procedures are to be established within the national legal system to resolve land claims of them.

In the emergence of necessity for relocation, indigenous people's free and informed consent is required by Article 16. The article further states as soon as the grounds for relocation cease to exist, these peoples shall have the right to return to their traditional lands. When such return is not possible, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them otherwise they should be compensated properly.

United Nations Declaration on the Rights of Indigenous Peoples was adopted by The General Assembly on the recommendation of the Human Rights Council's resolution 1/2 of 29 June 2006. This recognizes the need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources. (United Nations Declaration on the Rights of Indigenous Peoples, 2007)

The Article 8 of the Declaration recognizes the necessity of the States in providing effective mechanisms for prevention of, and redress for any action which has the aim or effect of dispossessing them of their lands, territories or resources. This right is further emphasized by the Article 10 as follows; 'Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.' When obtaining their free, prior and informed consent, the State shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions (Article 19). In addition to this right the declaration also recognizes the importance of their participation in the decision-making process with regard to matters which would affect their rights, and to maintain and develop their own indigenous decision-making institutions by the Article 18.

Article 26 (1) states that, Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. At the same time, it emphasizes the duty of the States in establishing and implementing an independent, impartial, and transparent process, giving due recognition to indigenous peoples' laws and traditions, to recognize and adjudicate their rights pertaining to their territories and resources, including those which were traditionally owned or otherwise occupied or used (Article 27). The declaration also emphasizes that Indigenous peoples have a right to redress by means of just, and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, in the event of confiscation or occupation of such lands without their free, prior and informed consent (Article 28).

Article 40 provides for the right to engage in prompt decision making through just and fair procedures for the resolution of disputes with States or other parties and for remedies for all infringements of their individual and collective rights.

Several International Courts have also recognized that rights of the indigenous community are not to be violated when carrying out developmental activities. In the case of *Raul Arturo Rincon Ardila vs the Republic of Colombia* held that, Indigenous lands have been protected as public goods with a special protection regime.

The case of *Yanomami vs Brazil* is one of the first reported cases where the Inter-American Commission on Human Rights outlined the doctrine on the right of indigenous peoples to receive special protection aimed at enabling the preservation of their cultural identity. IACHR recommended the State, in line with domestic legislation, to proceed to demarcate the Yanomami Park, to continue adopting preventive and remedial sanitary measures aimed at protecting the life and health of the Yanomami.

In *Saramaka People vs Suriname*, the IACHR after examining the rights of tribal peoples in international law, held that the members of the Saramaka people have a right to use and enjoy the natural resources that lie on and within their traditionally owned territory and that are necessary for their survival. Further it was held that Suriname may restrict this right by granting concessions for the exploration and extraction of natural resources only when such restriction does not deny the Saramaka's survival as a tribal people.

In the case of *Endorois vs Kenya* the African Commission on Human and Peoples Rights held that there was a clear violation of the African Charter on Human and Peoples' Rights, specifically the rights to religious practice, to property, to culture, to the free disposition of natural resources, and to development by the Kenyan government.

In the Canadian case of *Tsilhgot, in Nation v. British Columbia* (26 June 2014, SCC 44, Docket No. 3498662614) the Court required that free, prior, and informed consent of the indigenous people must be obtained before their property can be taken or infringed upon.

Furthermore, the Constitutional Court of Guatemala (December 2013), in the case of *Mataquescuintla v. Guatemala,* held that under ILO Convention 169 the Government was required to obtain the peoples' consent before it could proceed to permit a mining operation by a private corporation to begin production (Soares, 2013). In this case, 96% of the local people rejected operation of the mine through a public referendum.

Moreover, in many indigenous cultures their land is worshipped as 'Mother Earth' while making it the core of their culture. In their view, lands should neither be torn open and exploited nor be bought, sold or bartered. These views have been adopted by the new constitution of the Ecuador for the first time in history by establishing "Pachamama" (dragon goddess) as a legal entity.

When analyzing these international conventions, declarations and judicial decisions, it is evident that the international community has recognized the importance of protecting the rights of indigenous people against developmental activities.

V. COMPARATIVE ANALYSIS AND LESSONS TO BE LEARNT

When considering about the Sri Lankan situation, it is evident that Indigenous People within Sri Lanka has the minimum rights and protection. Sri Lanka has voted in favor of United Nations Declaration on the Rights of Indigenous People which was adopted in 2007. As Sri Lanka is a dualist country, mere voting in favor of a convention does not make it a part of the common law of the country. Nonetheless, the State has not enacted a specific legislation or mechanism to protect the rights of the indigenous people. 'Wildlife conservation laws and regulations Fauna and Flora Protection Ordinance, Forest Ordinance and National Heritage Wilderness Areas Act have deprived them of hunting grounds and criminalized their livelihood.' (The Rights of Indigenous Peoples, 2017) Section 3 of the Fauna and Flora Protection Ordinance prohibits any person to enter in to Strict Natural reserves, Nature reserves or Jungle corridors and entering to National Parks are allowed only for the purpose of observation. Further it prohibits hunting and collecting any plants within any of these forests. Section 6 and 7 of the Forest Ordinance states that any form of harm done to the forest or any form of hunting within a forest reserve is considered to be an offence. Section 3 of National Heritage Wilderness Areas Act prohibits any person to enter into or remain within any National Heritage Wilderness Area unless it is for an official purpose. Section 4 prohibits any act within such area which could harm the environment. When analyzing these provisions it becomes clear that the indigenous community have

been deprived of their lands as well as their way of living. Other than that, large development projects have forced them to resettlement. These populations are socially isolated and deprived of the basic facilities for survival. This can be recognized as a clear violation of Article 10 of UNDRIP and Article 16 of ILO Convention 169 as they specifically recognize that indigenous people shall not be relocated without the free, prior and informed consent of them and also they should be fairly compensated too. Also Article 19 of UNDRIP and Article 7 of ILO Convention 169 recognize the importance of their participation in the decision-making process with regard to matters which would affect their rights. When considering the Pollebadda situation, it is clear that Vedda community has not been properly informed regarding the development projects and their necessities and rights have not been taken into consideration. There is no free, prior and informed consent as they were not participated in the decision making process while it was clearly visible that such development project would affect the Vedda community to a greater extent.

The Constitution of Sri Lanka recognizes the freedom of movement and choosing one's residence in Sri Lanka under Fundamental Rights [Article 14(h)] Forcing Vedda people out of their lands for development projects will violate this basic fundamental right of those people. Further under Directive principles of State policy expressly states that, 'The State shall protect, preserve and improve the environment for the benefit of the community.'[Article 27(14)] But when considering the recent events such as the issues in Pollebadda area it is evident that the Development projects do not improve the environment as well as it is not beneficial to the community who are dwelling in that area. Constitution under Article 28(f) recognizes every person within Sri Lanka has a fundamental duty to protect nature and conserve its riches and also 28(e) recognizes that every person should respect the rights and freedoms of others. But according to Article 29 it provides that these provisions do not confer or impose legal rights or obligations and any inconsistency with such provisions shall not be raised in any court or tribunal. Therefore, the protection given to the indigenous community through the above mentioned provisions are limited. But when comparing this with the world, it can be observed that countries such as Ecuador have recognized the environment as a legal entity with its own rights through the constitution. This inevitably protects the rights of the indigenous people as they are connected with the nature.

Environmental Impact Assessment (EIA) is recognized as a process of identifying the anticipated environmental effects of proposed developments. This can be recognized as a method of making decisions in developmental sector more transparent and also to mitigate negative environmental impact. , the principle of Free, Prior and Informed Consent (FPIC) can be discussed along with EIA. FPIC is recognized as an inherited right of Indigenous People for their lands and resources (Report of the Working Group on Indigenous Populations on its twenty-second session, 2004). This principle is recognized in the case of *Saramaka People vs. Suriname*. It can be presumed that the principle of FPIC is recognized through conducting an EIA. In the context of Sri Lanka National Environmental Amended Act, No. 56 of 1988 introduced the EIA Process in Part IV C entitled Approval for projects. Mainly EIA is done for large scale developmental projects and for the projects which are located in environmental sensitive areas. Not only EIA but Also IEE is also recognized by NEA in order to protect the environment and habitats. *Bulankulama and others vs. Secretary, ministry of Industrial development and others* emphasizes the importance of conducting an EIA before initiating the developmental project. Furthermore, in the case of *Gunarathna vs. Homagama Pradeshiya Saba* emphasises that Public participation and Right to Information as the two Principles of EIA which should also be concerned. Through conducting EIA, the principle of FPIC will also be considered hence the rights of the indigenous community will also be protected. Therefore, in the context of Rabakan Oya, non-conduction of EIA has caused the aforesaid problems to the Vedda community as well as to the environment.

VI. RECOMMENDATIONS

Thus, it is evident that a proper legal framework is to be implemented in order to protect the indigenous community and their basic rights. The above mentioned existing legal framework should be amended to recognize the rights of the indigenous community. Conservation of the environment and sustainable development should be given vital importance to ensure that development is continued while minimizing the harm done to both indigenous community and the environment.

The legislature should recognize the indigenous community as a vulnerable group of people who

needs special protection. Specifically, the constitution should recognize the right to the environment and importance of conserving natural resources. Right to a clean and healthy environment should be acknowledged as a basic fundamental right of every citizen. Environment Impact Assessment should be mandated and a proper screening process should be implemented to ensure that EIA is properly completed when conducting any developmental activity. It should be properly managed to ensure that the harm done to the environment is properly assessed and given solutions to. Legislature such as FFPO, FO and National Heritage Wilderness Areas Act should be amended to recognize the rights of Indigenous people and due recognition and protection of and access to the traditional forest habitats of the Veddas should be provided. Their traditional way of living such as hunting should be allowed to a reasonable limit under restrictions, rather than making it an offence. Thus section 6 and 7 of the FO should be amended accordingly. Section 3 of FFPO and section 3 and 4 of National Heritage Wilderness Areas Act also should be amended so that Vedda community is allowed to enter into their natural habitat rather than chasing them out of it. Further specific legislation should be implemented recognizing the cultural practices and rights of Indigenous people in Sri Lanka. An independent authority should be established in consultation with and participation of the community to guide and co-ordinate law and policy with a view to safeguard the rights of the Vedda community.

Finally, ILO Convention 169 on indigenous peoples should be ratified and a time-bound plan of action should be implemented to ensure adherence to the convention and realization of rights in the UNDRIP.

VII. CONCLUSION

Indigenous people of Sri Lanka have inhabited the island for several millennia. They have adapted and coped with external and internal stresses which could easily result in vanishing them as a cultural group. One of the most prominent external stresses can be recognized as exponential development and its effect upon their natural habitat. This can be clearly identified in recent land acquisition of Rambakan Oya forest reserve and its repercussions on Vedda community. Due to the lack of proper law enforcement it has become challenging for the Vedda community to secure their rights.

As discussed above the international standards such as ILO convention 169 and the UNDRIP have comprehensively addressed protecting the rights of the indigenous people while conducting developmental activities. When comparing to these international standards it was evident that the Sri Lankan legal framework is inadequate to address the rights of Vedda community. This study recognizes the importance of protecting the rights of indigenous people and recommends amendment of the existing legislature and implementation of a proper legal framework which will safeguard their rights while sustainably developing the country.

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ABBREVIATIONS AND SPECIFIC SYMBOLS

EIA - Environmental Impact Assessment

FFPO – Flora and Fauna Protection Ordinance

FO – Forest Ordinance

FPIC - Free, Prior and Informed Consent

IACHR - Inter-American Commission on Human Rights

ILO – International Labor Organization

NEA - National Environmental Amended Act

UN – United Nations

UNDRIP - United Nations Declaration on the Rights of Indigenous Peoples

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AUTHOR BIOGRAPHIES

Sachini Boraluwa has obtained her LLB degree from General Sir John Kotelawala Defence University and also she is a final year student of Sri Lanka Law College. She takes a keen interest in the areas of Human Rights Law, International Law, Environmental Law and International Relations.

Nimthara Dissanayake has obtained her LLB degree from General Sir John Kotelawala Defence University and also she is a final year student of Sri Lanka Law College. She takes a keen interest in the areas of Human Rights Law, International Law and Commercial Law.

Methma Ranaweera has obtained her LLB degree from General Sir John Kotelawala Defence University and also she is a final year student of Sri Lanka Law College. She takes a keen interest in the areas of Human Rights Law, Intellectual property Law and Environmental Law.

Personal Data Protection in the Context of Employment: A Discussion of Law in Sri Lanka in the Light of the GDPR

RLW Rajapakse

The Open University of Sri Lanka, Nawala, Sri Lanka

iwrajapakse@gmail.com

Abstract - The right to privacy is recognized as a fundamental right in various legal instruments including international conventions. Personal data consists of a major part of privacy. Employees are a vulnerable category whose personal data may easily be misused by the employer due to the unequal power between the parties. Employee surveillances are done for many purposes such as improving employee productivity, selecting and retaining honest employees, evaluating employee performance, and maintaining workplace discipline. Under the above context, this research explored the prevailing provisions in the law on individual privacy and data protection in the employment context in Sri Lanka, in the light of the General Data Protection Regulations (GDPR) passed by the European Parliament. Special attention has been given to the public sector employment. This research study utilized the qualitative methodology where the researcher studied, analysed and synthesized a variety of materials gathered from primary and secondary sources to formulate a conclusion and to come up with the study results. Finally, the research revealed that the prevailing laws and regulations in Sri Lanka are not adequate to protect the personal data of employees; however, once the draft Personal Data Protection Bill will become an Act of Parliament, there will be an added responsibility on the part of the employer. This study fills the lacuna of having a comprehensive legal analysis pertaining to the area of employee personal data protection in Sri Lanka by suggesting how the laws should be amended to fill the gaps in the existing law.

Keywords— personal data, data subject, data controller, employee privacy, public sector employment

I. INTRODUCTION

Protection of data related to individuals is felt immensely nowadays more than ever in history owing to the rapid development of electronic records of information. Personal data are gathered, stored, and processed electronically for various purposes such as banking transactions, health purposes, security purposes, statistical requirements, human resource management purposes, and many more.

Though Sri Lanka is not an exemption from this technological transformation that has embraced the whole world, still Sri Lanka is lacking in enacting separate legislation on personal data protection. A bill has been drafted with the initiation of the Information and Communication Technology Agency (ICTA) of Sri Lanka, but it has not become an Act of Parliament yet. However, as per the officials of the ICTA, the new 'Personal Data Protection Act' will be enacted very soon in Sri Lanka.

Article 12 of the Universal Declaration of Human Rights (UDHR) and Article 17 of the International Convention on Civil and Political Rights (ICCPR) of the United Nations Organization recognize the right to privacy as a fundamental right. Even though Sri Lanka has ratified the ICCPR, the right to privacy has not been recognized as a fundamental right under the Constitution of Sri Lanka. However, certain legislative provisions such as Computer Crime Act (2007), Electronic Transactions Act (2006), Right to Information Act (2016), Banking Act (1988), Telecommunications Act (1991), and Intellectual Property Act (2003) may be regarded as being relevant to the right to privacy and data protection in Sri Lanka. Moreover, the right to privacy is protected in Sri Lanka as a 'delict' within the notion of *actio injuiarum* which has been developed by case law such as *Nadarajah Vs Obeysekara* (1971), *Hewamanna Vs Attorney General*(1999), and *Ratnatunga Vs. The State* (2001).

Public authorities are expected to be transparent in their exercise of power, but the same level of transparency cannot be expected from the individuals since the more transparent they are, the more they are vulnerable to unequal treatment (Right to privacy in Sri Lanka: discussion paper, 2020). Employees are

one of the most vulnerable categories of persons whose privacy rights including personal data protection rights may easily be violated in the hands of their employer owing to the huge gap of bargaining power between these two parties.

However, the right to protect personal data cannot be considered as an absolute right and it should be meaningfully enjoyed while considering other opponent rights such as the right to information, public security, public health, and employers' interests in monitoring the job tasks of their employees, etc. To strike a balance between these opponent rights, a well-defined data protection law should be there in a country. Thus, a data protection law will act as a mediator between individual interests and public interests. The General Data Protection Regulation (GDPR) passed by the European Parliament, which came into effect from 25th May 2018 in all European Union (EU) member states has become a model for non-European countries too to develop data protection laws of their own.

Under the above background, it is expected by this research to explore the prevailing provisions in the law on individual privacy and data protection in the context of employment in Sri Lanka, in the light of the GDPR. Special attention has been given to public sector employment. The assumption is that employee privacy including the personal data of them is not adequately protected under the prevailing laws of Sri Lanka. Therefore, the following research problem will be central to this study.

How does unequal bargaining power between employer and employee affect the rights of personal data protection of the employee? What have legislations done to stimulate employee privacy and personal data protection by minimizing the gap of bargaining power? Will such legislation affect the interests of the employer and how to strike a balance between employees' rights to protect their data and the employer's interests of smooth running of the business?

To unfold the above research problem, the following research questions will be examined.

What are the laws and regulatory provisions available in Sri Lanka that allow the employer to collect and process of personal data of employees?

What are the laws and regulatory provisions available in Sri Lanka on right to individual privacy and data protection?

What are the GDPR provisions on the right to protect the personal data of employees?

Is there a gap between the GDPR provisions and legislative provisions of Sri Lanka?

II. METHODOLOGY

This is a doctrinal or non-empirical, reform-oriented research that intensively evaluates the adequacy of existing laws on data protection in Sri Lanka in the context of employment and which recommends changes to be made. The researcher reads and analyses various kinds of materials gathered through primary and secondary sources to formulate a conclusion and come up with the study results. Being primary sources, legislations of Sri Lanka including the Constitution and case law on the subject were studied and analysed to identify the gap between the law of Sri Lanka and the GDPR passed by the European Parliament. Secondary sources such as reports, journal articles, legal treaties, etc. were used to explore the importance of having enforceable laws on individual privacy and data protection.

III. LITERATURE REVIEW

The term 'privacy' has been interpreted as a state in which one is not observed or disturbed by other people (Oxford Dictionary on Lexico.com, 2021). Privacy has been accepted as a human right under many international conventions. Article 12 of the UDHR specifically articulates that 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attack on his honour and reputation. Everyone has the right to protection of the law against such interference or attack'. International Convention on Civil and Political Rights (ICCPR- Article 17), European Convention on Human Rights (ECHR- Article 8), and Convention for Protection of Individual with Regard to Automatic Processing of Data are some other international treaties that have provisions on individual privacy and data protection.

In Sri Lanka, there is no express protection of privacy in the Constitution or other legislation, and this has been criticized as a weak point (Right to privacy in Sri Lanka: discussion paper, 2020). However, sections 53 and 54(1) of the Sri Lanka Telecommunication Act as amended by Act No. 27 of 1996 protects the privacy of people without directly mentioning it by introducing penalties including imprisonment for interception of telecommunication transmissions and the disclosure of their contents. Moreover, it is

argued that Article 14(1)(e) of the Constitution carries sufficient rationale for the Supreme Court to interpret and carve out the privacy rights (EPIC-Privacy and Human Right Report, 2006). Article 14 A (2) which has been introduced by the 19th amendment to the Constitution further clears the way of carving privacy rights since it has specifically mentioned that the right to access to information may be curtailed on the ground of privacy. Even before this amendment, in *Sinha Ratnatunga Vs. The State*, the Court of Appeal held that,

> What the press must do is to make us wiser, fuller, surer, and sweeter than we are. The press should not think they are free to invade the privacy of individuals in the exercise of the constitutional right to freedom of speech and expression merely because the right to privacy is not declared a fundamental right of the individual.
>
> The law of defamation both civil and criminal is also geared to uphold the human beings' rights to human dignity by placing controls on the freedom of speech and expression. The press should not seek under the cover of exercising its freedom of speech and expression make unwarranted incursions into the private domain of individuals and thereby destroy his right to privacy. Public figures are no exertions. Even a public figure is entitled for a reasonable measure of privacy.

This shows that the Sri Lankan courts have accepted the privacy rights of individuals though it is not specifically mentioned in any legislation.

There is a difference between the right to privacy and the right to protect someone's personal data, in the sense that, the right to privacy consists in preventing others from interfering with one's private and family life while personal data protection is the right to keep control over one's information (Lakiara, 2018). When considering this meaning, we can find no direct or indirect legislative provisions for personal data protection in Sri Lanka yet. It is expected that the draft Bill will be passed very soon since the Department of Legal Draftsman has already released the final version of the draft.

Researches done on the right to protection of personal data have suggested that employee vulnerability due to inequality of power may be misused by the employer to extract more information from an employee without his full-hearted interest or participation (Krishnan, 2006). Employee surveillances are done for many reasons such as to improve employee productivity, selecting and retaining honest employees, evaluating employee performance, etc (Krishnan, 2006). Generally, there are no contractual obligations under a letter of appointment for employers to protect the personal information of the employees, but it is the employee, who has a duty, not to disclose confidential information of the employer (Hassan, 2017). This duty on the part of the employee is evident in Sri Lanka too in the 1st schedule of Volume II of the Government's Establishments Code. It seems recent data protection laws and regulations also have not paid much attention to the rights of data protection of employees. Ogriseg (2017) argues that personal data protection is not preserved in GDPR for workers with special rules.

When searching for literature, it can be identified that there is a huge dearth of research done on employee privacy rights and employee personal data protection rights in Sri Lanka. This may be mainly due to the non-availability of a specific law on the subject. However, it is now high time to explore this area since a new Personal Data Protection Act of Sri Lanka is on its way.

IV. DISCUSSION

According to Article 88 of the GDPR, personal data are collected and processed for many reasons in the employment context including but not limited to, recruitment, the performance of the contract of employment including discharge of obligations laid down by law or collective agreements, management, planning and organization of work, equality and diversity in the workplace, health and safety at work, protection of employers' or customers' property, and exercise and enjoyment on an individual or collective basis of rights and benefits related to employment and the termination of the employment relationship.

Accordingly, it is unavoidable that data protection laws and regulations will put a huge responsibility on employers to safeguard the personal data of employees. However, Article 88 of the GDPR, which deals with the processing of personal data in the employment context, has not regulated specific rules. Instead, it requires the member states to provide for more specific rules to ensure the protection of the rights and freedom in respect of the processing of employees' personal data and such rules shall be prepared in a way that the human dignity, legitimate interests and fundamental rights of the data subjects

to be safeguarded. Though there are no specific rules in the GDPR applicable for the employment context, it can be argued that all the other basic rules in the GDPR will be applicable for this context too since the employer can be defined as 'the controller' or 'processor' within the definitions in Article 4 of the GDPR, thus the 'the employee' becoming the data subject.

Article 4(8) of the GDPR defines the term 'processor' as 'a natural or legal person, public authority, agency, or other body which processes personal data on behalf of the controller'. Here, doubt arises whether a salaried employee of an organization, who has been entrusted the duty of processing of personal data of individuals, can be considered as the 'processor'. This matter will not arise in Sri Lanka in terms of the definition given for the term 'processor' under part IX of the draft Personal Data Protection Bill. The illustration given for this term in the Bill clearly shows that such an employee does not become the 'processor' and he is only an employee of the data controller. The Human Resource (HR) Department of an organization or the staff working there has been entrusted with collecting, processing, and storing of personal data of employees, but within the definition of the draft Bill, the responsibility of protection of these personal data lies on the organization, not on the HR personnel. This is the vicarious liability of the employer for the actions or omissions of its employees. However, the HR personnel may be subjected to disciplinary actions by the organization for dishonesty, breach of trust, or negligence, as appropriate, for the violation, if any, of the laws or regulations on data protection in the workplace.

As per clause (4) of the GDPR, the right to the protection of personal data is not an absolute right and it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. Accordingly, it is apparent that the employees cannot demand not to collect or process their personal data by the employer, but they can demand that the employer shall do it in a controlled manner.

There are six principles introduced by Article 5 of the GDPR for processing of personal data namely, (a) lawfulness, fairness, and transparency (b) purpose limitation (c) data minimization (d) accuracy (e) storage limitation, and (f) integrity and confidentiality. Hence, these principles will be applicable for employers too regarding the processing of the personal data of their employees. In terms of Article 6 of the GDPR, the lawful bases for data processing are consent, contract, public interest, vital interest, legitimate interest, and legal requirements. Article 13 of the GDPR requires the employer, being the data controller on one hand and the data processor on the other hand, when obtaining personal data of employees, shall provide the employees with the information such as lawful basis, the purpose of data processing, how long they are being retained if they are being shared with third parties, etc. Furthermore, only the necessary data to be obtained from the employees. On the contrary, as per chapter III of the GDPR, the employee, being the data subject, has a set of rights including the right to access and the right to have his/her data erased under certain circumstances.

These six principles as well as six lawful bases which are mentioned in the GDPR are available in the Personal Data Protection Bill in Sri Lanka too. Once the draft Bill becomes an Act of Parliament, those principles and legal bases will be applicable in the employment context in Sri Lanka too for both the public and private sectors. In terms of the principle of 'storage limitation', personal data shall not be kept for a longer period than necessary for the purpose of processing such data. The only exceptions are archiving purposes in the public interest or scientific, historical, research, or statistical purposes. This limitation is available in section 9 of the draft Bill in Sri Lanka too with the aforesaid exceptions. When considering the employment context, this limitation needs to be discussed more in the public sector sphere in Sri Lanka, since there are many rules and regulations governing the retention period of documents in government organizations such as National Archives Law (1973), Right to Information Act (2016), the Establishments Code of Sri Lanka and the Establishments Code of the University Grants Commission (UGC) and Higher Educational Institutions (HEIs).

In the public sector of Sri Lanka, almost all the personal data of employees are maintained in the personal file of the employee. According to chapter VI and clause 9 of chapter XXVIII of the Establishments Code of Sri Lanka and clauses 11 and 12 of the Establishments Code of the UGC and HEIs, there are a specific set of rules on the handling personal files and destroying them. In terms of regulations published in the Gazette No. 313 dated 31.08.1984 under the National Archives Law (1973), the personal file of a retired employee, an employee who has died, and a

casual or contract employee shall be kept for 10 years from the date of the retirement or the death as appropriate. Thereafter, those personal files can be destructed. The personal files of employees who have been dismissed from service, resigned, or sent on compulsory retirement for inefficiency shall be kept for 25 years, from the date of the termination of employment. However, the personal files of officers who had done a unique service to the organization or the country can be sent to the Department of National Archives for the purpose of archiving.

Archiving of personal data has been recognized both by the GDPR and the Personal Data Protection Bill of Sri Lanka, hence it will not be inconsistent with those regulations. However, retention of the personal data of public sector employees for 10 or 25 years after termination of their employment would be a problem with the principle of 'storage limitation'. Section 9 of the draft Personal Data Protection Bill in Sri Lanka stipulates that the period of retention of personal data shall be the period necessary for the purpose for which such personal data is processed. The only exception is the archiving purposes in the public interest or for scientific, historical research, or statistical purposes. Thus, it is in question how this responsibility put by the upcoming Personal Data Protection Act in Sri Lanka will be implemented by a public sector organization. Moreover, section 4 of the Bill stipulates that,

> It shall be lawful for a public authority to carry out the processing of personal data in accordance with its governing legal framework in so far as such framework is not inconsistent with the provisions of this Act.
>
> In the event of any inconsistency between the provisions of this Act and the provisions of any other written law, the provisions of the Act shall prevail.

When destructing any document whether containing personal data or not, the possibility of litigation shall also be considered. Accordingly, it will be lawful, for keeping the personal data of employees for a further period until the end of the term of prescription for litigation under the Prescription Ordinance, after fulfilling the purpose for which they were collected and processed. It is also argued that the prevailing rules and regulations regarding the destruction of documents of public institutes are overprotective of the interests of the employer, putting the personal data protection and privacy rights of the employee in danger.

Another area of dispute in the employment context is the right to access, right to rectification or completion, and right to the erasure of personal data by the data subject as stipulated in Article 15, 16, and 17 of the GDPR as well as in sections 14, 15, and 16 of the draft Bill in Sri Lanka. It is a question of whether these rights can be implemented in the sphere of public sector employment, as many restrictions are there in the Establishments Code and circulars in this regard. Personal files of employees are considered strictly confidential under clause 5 of chapter VI of the Establishment Code of the Government as well as under clause 30:9 of chapter III of the Establishments Code of the UGC and HEIs in Sri Lanka. Though it ensures the confidentiality of the personal data of employees, it restricted the accessibility of the employee to his own personal data maintained by the employer. As per clause 30:9 of chapter III of the Universities' Establishments Code, a university employee is entitled to access only to his history sheet maintained by the university, once in five years in the presence of an authorized officer. A similar provision was there in the clause 2:9:6 of chapter VI of the Government's Establishments Code, but after enacting the Right to Information Act in Sri Lanka in 2016, the said provision has been amended by circular No. 06/2019, issued by the Department of Public Administration. The new circular permits access to one's own history sheet without limitations as far as no inconsistency with the Right to Information Act. Since this is a requirement not only under the Right to Information Act but also under the upcoming Personal Data Protection Act, it is suggested that the relevant provision in the Universities' Establishments Code shall be amended. Similarly, clauses 7:1, 7:2, and 7:3 of chapter XX of the Universities' Establishments Code stipulate that no person employed in the UGC or a higher educational institution is entitled to obtain a copy of official correspondence or a document relating to himself or otherwise. However, in the Government's Establishments Code, the parallel provision (Clause 4 of chapter XXVIII) has been amended by the aforesaid circular No. 06/2019. Thus, this is also another place where the Universities' Establishments Code needs to be amended.

A very sensitive categories of personal data are gathered annually from the employees in the category of 'staff officer' and above, in the public sector sphere in Sri Lanka, under the Declaration of Assets and

Liabilities Law (1975). According to section 3 of the said law, the employee to whom this law is applicable shall declare the assets and liabilities of himself or herself, his or her spouse, and children who are unmarried and below 18 years old. Moreover, section 5(3) of this law permits any person to call for and refer or to obtain such declaration from the authority to which such declaration has been made, on payment of a prescribed fee. The purpose of this law must be to prevent and detect corruptions and misuses of public funds by the public officers to whom such funds have been entrusted with. Though public authorities are required to act transparently, the aforesaid provision on public employees seems unnecessary intrusion of their personal data and privacy rights. In terms of the definitions given in the draft Bill in Sri Lanka, the 'financial data' are considered as a 'special category of personal data' for which, the processing is required to be done under schedule II of the draft Bill. Accordingly, it seems section 5(3) of the Declaration of Assets and Liabilities Law is inconsistent with the requirements of the draft Bill.

However, whatever the things mentioned in Establishments Codes or domestic regulations in an organization, whether private or public, it must adhere to the rights of data subjects granted by the upcoming Personal Data Protection Act as the said Act will supersede all the other laws and regulations. Nevertheless, as mentioned somewhere else in this paper, none of these rights are absolute and need to be enjoyed proportionately considering the other opponent factors as well.

V. CONCLUSION

Employees are a susceptible category of persons whose personal data can easily be misused by the employer. Prevailing regulatory provisions in Sri Lanka have more concern on employer privacy rather than employee privacy. The GDPR and the draft Personal Data Protection Bill in Sri Lanka also have no specific provisions regarding data protection in the employment context. However, within the interpretations given for the terms 'data controller' and 'processor', in the GDPR and the Bill in Sri Lanka, it is concluded that all the provisions in those instruments are applicable for the employment context without distinction. Since the public sector employment in Sri Lanka including the state university sector is governed by the Establishments Codes applicable to them, certain provisions of those codes will have to be amended once the Personal Data Protection Act is enacted.

It is a cardinal principle in labour law that the employer-employee relationship has built upon the trust of each other. Breaking of the said trust by the employee has always justified his termination, by the court, but less attention has been paid for the breaking of the trust by the employer. Feeling of the employee that he is untrusted by his employer will result in employee frustration with the organization. Therefore, more surveillance over the employees is done by the employer, which will lead to the ultimate poor performance of the employee. Hence, having legislative control over employee surveillance and processing of personal data by the employer will enhance the trust between two parties and thereby the employer will get ultimate benefit through increased productivity of the employees. Thus, this research supports the hypothesis to a certain extent, that employee privacy including their personal data is not adequately protected under the prevailing laws of Sri Lanka and this is more evident in the public sector sphere. It is expected that the upcoming Personal Data Protection Act will cure those issues in Sri Lanka.

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AUTHOR BIOGRAPHY

Rajapaksege Lalani Washintha Rajapakse is an Attorney-at-Law, Notary Public, and Commissioner for Oaths having more than 20 years of experience in the legal field. She has been graduated with an LLB Degree in 2005 from the Open University of Sri Lanka and the LLM Degree in 2012 from the University of Colombo. Presently, she is working as the Senior Assistant Registrar (Legal & Documentations) of the Open University of Sri Lanka.

Right to Internet Access for the Development of Online Education in Sri Lanka during Covid-19: A Comparative Analysis of Finland, France and India

AS Samarakoon#, VP Liyanage and VP Liyanage

Sri Lanka Law College, Hulftsdorp *Street, Colombo 12, Sri Lanka*

#avanisasanka95@gmail.com

Abstract - At present it is evident that Covid-19 has created a significant negative impact on the education of children. This problem has caused a huge impact on undergraduates and Advanced Level students in rural areas. Therefore, this research identified whether there are sufficient laws to protect the right to online education of children in Sri Lanka during the COVID-19 pandemic. The research problem is whether the prevailing laws in Sri Lanka are sufficient to safeguard the right to online education of children during COVID-19 by ensuring the right to internet access. The objectives of this research are to identify the impact of COVID-19 on the education of children and whether the Sri Lankan legal framework is sufficient to address such issues, and to propose necessary amendments to the existing legal regime to fill the gaps. The methodology of this research is a blend of qualitative and quantitative methods. Further, the study is a combination of black letter methodology and comparative research methodology. Moreover, this research employed a qualitative analysis of primary data as well as secondary data where primary data was gathered using a questionnaire distributed among the undergraduates of University of Sri Jayewardenepura and Eastern University. Finally, the research concludes with a view that the existing domestic laws are insufficient to address the issues in online education of children during COVID-19 pandemic in order to achieve equal access to internet.

Keywords— COVID-19, internet access, education

I. INTRODUCTION

The education in the country was severely affected due to the Covid-19 pandemic. The biggest victims of this pandemic are the university students and the students who are doing Advanced Level and the Ordinary Level Examinations. Due to this emergency situation, all the universities, schools and other educational institutions were closed and continued the teaching process through online platforms such as Zoom, Microsoft Teams and LMS. There are both pros and cons to this method. Advantages of this method would be time saving, less tiredness and ability to participate in educational programs within Sri Lanka and also worldwide. But, this method can be a disadvantage to poor people in rural areas, where this method can be expensive since they have to buy smart devices and data cards to attend the classes or lectures. Not only that, but also there are instances where education is disrupted due to signal failures in rural areas.

With the end of the conflict in May 2009, the Sri Lankan Government has set out mega infrastructure development projects such as road constructions, airports and harbors with a view of expanding economic development in the country. Moreover, in accordance with the political decision statement, the 'Mahinda Chinthanaya', the President pronounced the year 2009 as the Year of English and IT to empower the making of an information society in Sri Lanka. As a result, the Government presented the e-Sri Lanka initiative along with the Information and Communication Technology Agency (ICTA) of Sri Lanka to strengthen the economy of Sri Lanka, to reduce poverty and to improve personal satisfaction of people. These initiatives were introduced by the government under different sectors.

The 'Nenasala' which is also known as the Knowledge Center would be illustrative of this which was a project carried out by the Government along with the ICTA to establish Rural Knowledge Centers, e-Libraries, Distance and e-Learning Centers. Additionally, The Ministry of Education along with the "Asian Development Bank" implemented the 'Secondary Education Modernization Project' (SEMP) pointing towards interfacing a larger portion of the secondary education schools and other related

associations on a Wide Area Network. Thus, this implies that the right to internet access to education has been given prominence after the post war era.

However, the research question is whether due consideration has been given by the Sri Lankan government to allow equal access to internet for children in line with their right to online education during Covid-19 because the closure of universities and schools due to Covid-19 has led to continue education through distance learning by way of online methods through the internet such as by Zoom and Microsoft Teams etc which highly affected the students in rural areas due to their poverty and unavailability of internet coverage.

II. METHODOLOGY AND EXPERIMENTAL DESIGN

The methodology of this research is a blend of qualitative and quantitative methods which is a mix method. Also it has a combination of Black-Letter (Doctrinal) Methodology and Comparative Research Methodology with Finland, France and India. The Black-Letter Methodology is used to provide a descriptive and a comparative legal analysis on the area to highlight the differences in the respective legal regimes. Under the Comparative Research Methodology, a comparative analysis between Finland, France and India will be conducted in order to identify the differences between the said jurisdictions in the area of right to internet access on online education during Covid-19. Further, the research would employ a qualitative analysis of primary data including the 1978 Constitution of Sri Lanka, The Right of Children to Free and Compulsory Education (RTE) Act 2009 of India and judicial decisions and secondary data including journal articles and web articles. And also this study employs a quantitative analysis using a questionnaire. For the study, a questionnaire was distributed among three hundred and eighty (380) Advanced level students, undergraduates and postgraduate students of University of Sri Jayewardenepura and Eastern University of Sri Lanka who are in rural areas with a difficult background, and the purpose was to find out how much this online system has affected their online education.

III. RESULTS AND DISCUSSION

A. Data Analysis

The objectives of this research are to identify the impact of Covid-19 to online education of children, identify whether the Sri Lankan legal framework is sufficient to address such issues and to propose necessary amendments to the existing legal regime to fill the gaps. The information was gathered using a questionnaire to identify how the pandemic has affected the online education of students.

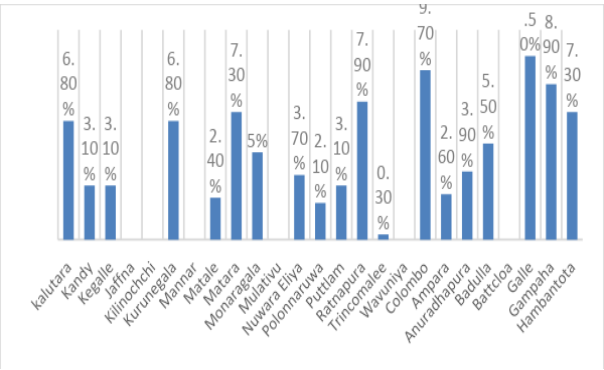

Fig.1 - District

The respondents who contributed to this research are from different districts where most of them are from rural areas.

Most of the respondents have mentioned that they continued the education using zoom and LMS.

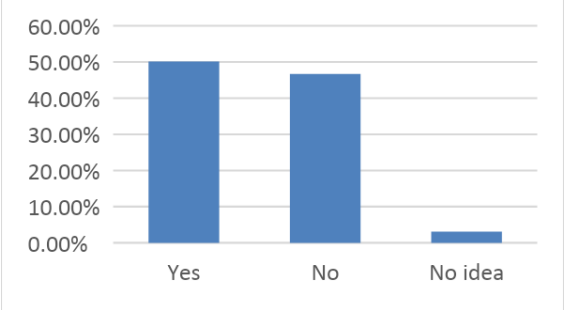

Fig.2 – Sufficiency of the Internet Speed for Educational Purposes

Since most of the respondents are from rural districts such as Anuradhapura, Polonnaruwa, Nuwaraeliya etc. they are facing internet difficulties due to lack of signal. Fifty percent (50%) of the respondents mentioned that online education was affected by the less speed of the internet.

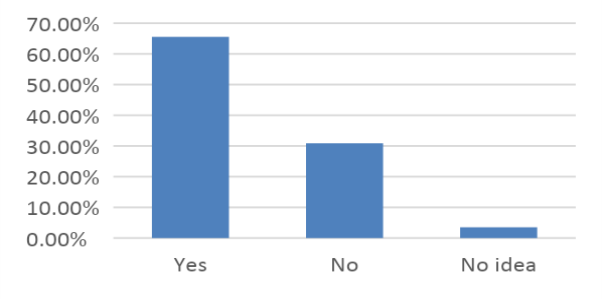

Fig.3 – Whether Education was affected due to internet signal issues, audio issues and reconnection issues

It is evident that online education can also be affected by signal issues, audio issues and reconnection issues. Sixty-five percent (65%) respondents have faced this issue.

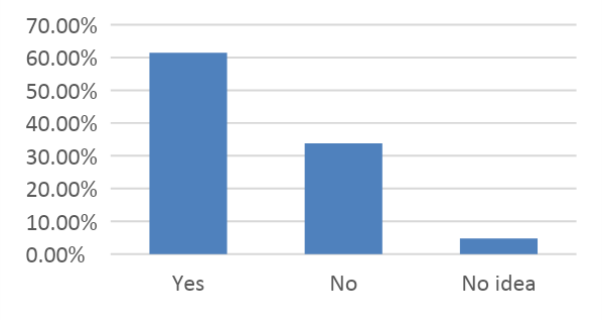

Fig.4 – Whether financial difficulties arose when attending lectures through online platforms

To attend lectures through online platforms cost a lot. For this, students have to buy proper smart devices to attend the lectures and they have to buy data cards for that. So this would be a burden and extra stress for students who have financial difficulties. Most of the respondents (64.4%) mentioned that they have faced these financial difficulties when attending lectures through online platforms. This has restricted their right to online education.

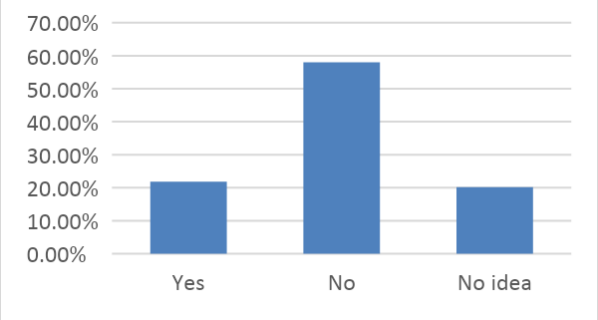

Fig.5 – Whether Government intervention for online Education during Covid-19 is adequate

Since online education is inevitable due to the pandemic, the government should introduce proper remedies for the aforesaid difficulties while implementing a proper mechanism to regulate it. Fifty eight percent (58%) of the respondents mentioned that government intervention is inadequate in this regard.

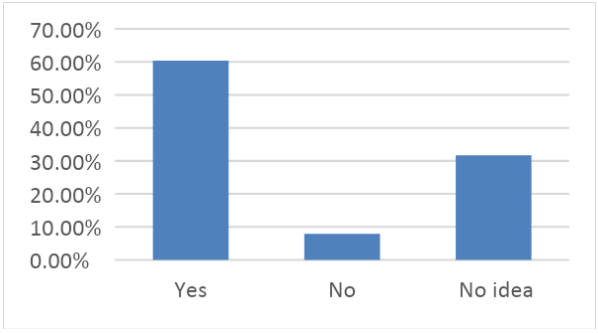

Fig.6 – Whether the Government should recognize Right to Internet Access as a Fundamental Right in the Constitution

Countries such as France, India and Finland have recognized the right to internet as a Fundamental Right. This implies that right to online education should be ensured equally. However, in the contemporary world, the rights should be changed and updated. Recently, most of the people in the world use the internet for their work. Specifically, with the pandemic it has become a basic need because of the concepts such as work from home and distance learning. So, sixty point four (60.4%) respondents have mentioned that, government should recognize right to online education as a Fundamental Right. In other words, right to internet access should be safeguarded as a Fundamental Right.

B. Right to Internet Access on Education in Finland during Covid-19

Finland has become the very first country in the world to make the internet a "legal right" for every resident (Wood,2017). Finland has promised to connect everybody to a 100 Mbps connection by 2015. On the other hand, the UK administration has guaranteed a minimum connection of at least 2 Mbps to all homes by 2012 yet has not recognized this as a privilege in law. The Finnish arrangement implies that from 1st July all broadcast communications

organizations will be obliged to furnish all residents with broadband lines that can run at least 1 Mbps speed (BBC,2010) . Finland is one of the countries in the world where around 95% of the population has a type of internet access. Furthermore, the law has intended to carry the internet to rural areas, where the geographic difficulties have restricted its admittance up to this point.(Ahmed,2009). This is a view shared by the United Nations, which is making a major push to consider internet access a common freedom.

Because of the school closures due to Covid-19, alternative strategies such as digital learning environment, distance learning, necessary arrangements and independent learning have been introduced in Finland. Moreover, the required evaluations and testings have also been initiated. Finland has utilized online platforms to cater the right to education of children. In other words, Finland has utilized the internet as a means of securing the right to education of children. Hence, it is evident that Finland has ensured right to internet access on education during Covid-19 by guaranteeing the right to internet access.

Additionally, it is important to note that there are several benefits of these online platforms. For instance, they can be used for publishing evaluations, assignments, test marks of students and subject notes. Helmi, Wilma (Primus), Studentaplus and Sopimuspro are the basic platforms which have been utilized for both primary and secondary education in Finland during Covid-19(The world bank 2020). Despite the fact that the nonappearance of in-person lessons can be fairly compensated by the use of online stages and other innovations, the admittance to vital computerized gadgets is not similarly conveyed over the population. Therefore, specifically, the students from socio-economically disadvantaged backgrounds who do not have the way to admittance to these electronic devices might be seriously affected by the COVID-19 pandemic which will ultimately lead to expanding the learning imbalances (OECD 2020). The conditions for establishing a sufficient atmosphere for home schooling depends on the likelihood of admittance to innovation while having a proper physical space for learning from home. According to a study, in Finland, 96% of students have a calm space to learn at home which is higher than the OECD normal (91%) and this rate was 93% for students originating from the base quartile of the financial conveyance, which is higher than the OECD normal (85%). (OECD 2020)

Therefore, when analyzing the legal regime of Finland, it is clear that it has taken considerable initiatives to protect right to education of children during Covid-19 by ensuring the right to internet access to everyone.

C. Right to Internet Access on Education in France during Covid-19

In June 2009, the Constitutional Council, France's highest court, announced access to the internet to be an essential basic liberty. In other words, the court has declared internet access as a 'Fundamental Human Right'. However, broadband is yet impossible in some rural places in France. In the event that a house is in a region not secured by a broadcast communications supplier, person will need to investigate satellite innovation on his or her phone and internet access. Furthermore, an online portal known as “My class at home” gives admittance to educational and learning opportunities upholding the judgment of the French court which decided that admittance to the internet is a fundamental human right. (Sparks 2009).

Consequently, when analyzing the French jurisdiction also it is evident that it has protected right to education of children to a considerable extent during Covid-19 by ensuring the right to internet access to everyone.

D. Right to Internet Access on Education in India during Covid-19

Access to internet had been declared as a Fundamental Right in India by the Indian Supreme Court which is evident from *Faheema Shirin v. State of Kerala* where the right to internet access was recognized as a Fundamental Right which forms part of both right to education under Article 21 of the Constitution and right to privacy. Article 21A of the Constitution provides for free and compulsory education for all children between six to fourteen years as a Fundamental Right. The Right of Children to Free and Compulsory Education (RTE) Act, 2009 (The Right of Children to Free and Compulsory Education Act. 2009). describes the importance of free and compulsory education for children between six to fourteen years in India under Article 21A of the Indian Constitution.

Furthermore, many free digital e-Learning platforms which assist students in continuing their learning during COVID-19 due to school closures was subjected to wide discussion in a press release by the Ministry of Human Resource Development (HRD) on

March 21, 2020 (The world Bank,2020). The DIKSHA portal, e-Pathshala, The National Repository of Open Educational Resources, Swayam and Swayam Prabha would be illustrative of these free digital e-Learning platforms.

Therefore, it is evident that the Indian Jurisdiction has sufficiently addressed right to internet access on education in India during Covid-19 through its legal framework and by taking many other initiatives to protect right to education of children during Covid-19 by ensuring the right to internet access.

E. Right to Internet Access on Education in Sri Lanka during Covid-19

The system of free public education was introduced to Sri Lanka by Dr. C.W.W. Kannangara (Father of free education) by making education free for all students for their own benefit including underprivileged students in rural areas of the country. Therefore, the students from economically marginalized families will be ensured the access to education. This is further guaranteed by Article 12(1) of the Constitution which states that 'All persons are equal before law and are entitled to equal protection of law'. Moreover, according to the Directive Principles of State Policy and Fundamental Duties under Article 27(5) of the Constitution state shall take effective steps in the fields of teaching, education and information to eliminate discrimination (The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.).

The outbreak of Covid-19 has led to create adverse impacts on education of children in Sri Lanka. This resulted in halting academic activities in schools, universities and higher educational institutions for some time. The Sri Lankan government has proposed online education as a solution to address this issue (The Constitution of the Democratic Socialist Republic of Sri Lanka 1978) However, it could be argued that there are many issues arising out of online teaching through various online Apps. Technical issues would be illustrative of this. The main disadvantage in online teaching is that it excludes students who lack economic strength to buy equipment which are essential to connect with online lectures. Moreover, some students are marginalized for being unable to bear the cost for data or Wi-Fi. They are further disadvantaged due to the decreasing economic capacity due to Covid-19 which directly resulted in affecting the livelihood of their parents as well as them adversely.

On this basis it is necessary to introduce new laws to the current domestic legal framework with a view of protecting online educational rights of students in unforeseeable situations such as Covid-19 and it should be recognized as a legal lacuna that should be filled promptly.

IV. OBSERVATIONS AND RECOMMENDATIONS

Therefore, when comparing the legal regimes of Finland, France and India, it is clear that there is a clear gap in the Sri Lankan legal regime with regard to right to online education in Sri Lanka during Covid-19. Accordingly, following recommendations were made in order to effectively address the prevailing gap in the existing legal regime of Sri Lanka while comparing the three jurisdictions.

- Right to online education should also be incorporated as an express right to be included in the 1978 Constitution under the Fundamental Rights Chapter. India has incorporated a separate Fundamental Right to Education under Article 21A of the Constitution. This would be appropriate to be included into the Sri Lankan legal framework because it provides for free and compulsory education for all children between six to fourteen years and it provides a high degree of protection while maintaining equality.
- Online teaching should be implemented with wider consultation to be made available to all the students without discrimination on any ground such as poverty because there are many households with school-age children who do not have access to online education since they do not have access to internet. In order to address this, the government should take necessary steps to eliminate the cost for both teachers and students by providing necessary equipment and uninterrupted connectivity for online teaching and high speed internet access.
- Enact legislation to ensure the safe use of the internet by children for online education. For this, The Right of Children to Free and Compulsory Education (RTE) Act, 2009 of India would be better to be considered and provisions for safe use of internet should be included.
- Practically, it is important to establish a self-regulatory body to develop 'codes of good

practices' to guide the internet industry on measures which are required to keep children safe when using online platforms for online educational purposes.

V. CONCLUSION

The study reveals that the existing laws are not sufficient to address the issues relating to right to internet access to online education in Sri Lanka during Covid-19.

Therefore, as a whole when analyzing the above facts it is clear that there are many unaddressed issues that have arisen due to the Covid-19 pandemic which should be addressed promptly to secure right to online education of all the students in the country irrespective of poverty and on the division of rural or urban. Hence, it would be effective to introduce new laws to effectively address this issue.

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AUTHOR BIOGRAPHIES

Avani. S. Samarakoon is a LL.B. graduate of General Sir John Kotelawala Defence University and currently studies as a Final Year student at the Sri Lanka Law College and also reading for her master of laws in International Business law at Cardiff metropolitan university. Her research interest are Commercial Law, Criminal Law and Labour Law.

Vishna Pulnadie Liyanage is a LL.B. graduate of General Sir John Kotelawala Defence University. She is a Final Year student of the Sri Lanka Law College. Her research interests include Environmental Law, Criminal Law and Constitutional Law.

Viduravi Purasandu Liyanage is a Preliminary Year student of the Sri Lanka Law College. His research interests include Environmental Law, Criminal Law and Intellectual Property Law.

Puzzling out the Issue of Obesity under the Human Rights-Based Approach

MKG Jeewanthi[1] and MDK Kaneshika[2]

[1]*Department of Legal Studies, The Open University of Sri Lanka*
[2] *MJF Charitable Foundation, Sri Lanka*

#mkjee@ou.ac.lk

Abstract - The COVID- 19 pandemic has been the most devastating health catastrophe that humanity has faced recently, and recent research from several nations have clearly shown obesity as a prevalent attribute among persons who were seriously ill after getting the Corona virus. Obesity has become a global pandemic, causing many people to succumb to non-communicable diseases (NCD). The World Health Organization (WHO) has highlighted consuming an unhealthy diet, which mainly consists of high-fat, high-sugar, and high-salt foods, as a primary cause of obesity. In light of this background, the researcher in this work aims to provide an analysis for the obesity problem that is founded on human rights. The researchers aim is to examine the obesity problem through the lens of human rights, identifying potential human rights violations as well as state party obligations in this regard. In the meantime, the researchers attempt to give remedial options that are based on human rights and specific activities that different stakeholders might do to alleviate the obesity problem induced by eating unhealthy meals. This is a legal study, and the researchers used doctrinal analysis methods to accomplish it. Finally, it can be concluded that a human rights-based approach to addressing the health issue can be effective, and that individuals may be able to file a case under the broader definition of right to life against the state party for failing to take adequate steps to regulate the food industry, which causes obesity.

Keywords— food safety, obesity, HRBA

I. INTRODUCTION

Overweight and obesity are defined by the World Health Organization (WHO) as abnormal or excessive fat accumulation that can harm one's health and it's considered as a one form of malnutrition (General assembly Reso no: A/71/282, 16th August 2016). The Body Mass Index (BMI) is used to measure these conditions and a BMI of greater than or equal to 30 is determine an obese adult while a BMI of greater than or equal to 25 is considered to be overweight. According to global statistics, 39 % of adults aged 18 and older were overweight or obese in 2016, with precisely 13% being obese.

The gravity of the obesity issue more reflected recently with the Covid 19 pandemic which is widely regarded as one of the worst human health disasters ever as it resulted in the deaths of millions of people in a short period of time. Despite the fact that there are few other causes for this high rate of death, recent studies emerged from multiple countries have clearly identified obesity as a common trait of people who became critically ill after contracting the Corona virus(Mohammad et al., 2021; Zheng et al., 2020). According to studies, a BMI is a powerful indicator of illness severity in people younger than 60 years old (Lighter we al.,2020; Iacobellis et al., 2020; Zhang et al., 2020).When looking at the reasons why obese people are more prone to life-threatening situations, it is important to understand that people who are obese have a higher prevalence of diseases such as cardiovascular disease, Type 2 diabetes, renal insufficiency, some types of cancers, and a considerable number of endothelial dysfunction (Mohammad et al., 2021). As a result, it is evident that obesity is a threat to a healthy human lifestyle that must be addressed immediately.

Obesity can be caused due to certain reasons or conditions. Among the reasons such as unhealthy diet, lack of physical excise, genetic factors and medical conditions that leads to obesity, the WHO particularly identified that consuming unhealthy diet or consuming high-fat, high-sugar, energy-dense foods or consumption of unhealthy diet as well as a lack of supportive policies in sectors such as health, agriculture, food processing, marketing, and

education, exacerbate the situation. Some of the researchers also found that the main behavioral risk factors for obesity are excess consumption of foods and beverages including alcohol (Traversy (2015), Nyberg et al (2018), Popkin & Reardon(2018), Patterson et al., 2019).

Unhealthy diet has been featured and described in different level in multiple studies and among other types of food main three categories namely, high **sugary** foods, high **salt** foods and foods contains **trans-fat** can be identified as main causes of obesity and bad health. Scientifically, sugar that has been added is half glucose and half fructose. Despite the fact that humans get glucose from a range of foods, including starches, the majority of fructose comes from added sugar, which alters your body's hormones and biochemistry, resulting in weight gain. Insulin resistance and increased insulin levels are also caused by excessive fructose consumption. In food science there are two main types of carbohydrates identified and foods such as sugar, desserts, fructose, soft drinks, beer wine and ect.. categorized as simple carbohydrate which is dangerous for human health and complex carbohydrates such as brown rice, grains, pasta, vegetables, raw fruits and etc. When comparing with the complex carbohydrates, foods that contains the simple carbohydrates are more rapidly absorbed into the bloodstream which leads to pronounces insulin release after meals which promote the growth of fat tissues and cause obesity. Foods with high level of sodium (salt) contribute to the of accelerate of human blood pressure which leads to many non-communicable diseases (NCD's). Trans- fat is another risk factor which cause severe damage to the human health. The junk foods consist all sort of high salt, sugar and fat are made to be inexpensive, survive a long time on the shelf, and taste so delicious that they are difficult to resist, resulting in overeating. These types of foods allow to trigger the reward center of the human brain, and these foods are comparable to abused drugs like alcohol, cocaine, cannabis, and nicotine. As a result, people who consume too much junk food lose control over their eating habits. Taking little of these foods would not cause that severe harm to human body, however, given their high accessibility and deliciousness, and due to sharp marketing strategies people are now addicted to this type of unhealthy foods. While excess calories consumed from unhealthy foods can be burned through physical activity, the shift in technology from labor-intensive to service-oriented occupations, as well as changes in modes of transportation, has resulted in sedentary lifestyles, resulting in decreased regular exercise and energy expenditure (Barry, 2006). The processes of globalization, in particular trade and Foreign Direct Investments (FDI) in food processing, retailing, and food advertising and promotion, have been increasingly associated with driving shifts in dietary patterns towards those closely linked with obesity (Corinna, 2006).

II. OBJECTIVES OF THE RESEARCH.

The overall goal of this theoretical research is to look at obesity problem from a legal standpoint utilizing a human rights-based approach (HRBA), which decides how to provide solutions for a specific situation based on human rights norms. Further, there are three distinct aims in this study that can be defined;

1. to determine which specific individual rights are being violated by permitting people to consume an unhealthy diet that leads to obesity,
2. to identify the state responsibility of such violations.
3. to explore possible remedial measures/ actions that can take to protect the right to health of individuals.

III. METHODOLOGY

This is a legal research based on the doctrinal methodology which provide a theoretical argument throughout the research. Researcher has used constitutions, legislations, regulations, directives, international conventions & other instruments as primary sources and text books, dictionaries, journal articles, reports, commentaries, general articles and like as secondary sources for this study.

IV. DISCUSSION AND FINDINGS

A. Human rights-based approach

HRBA is a commonly used terminology in any forum related to human rights. Even though this term uses from the inception of the human right it is difficult to arrive at the universal definition for this word HRBA(Kapur & Duvvury 2006). A number of definitions for HRBA have been provided by various scholars in different forums, and these definitions are defined by academic literature in different ways, based on legal, social and political perspectives.

According to the interpretation provided by the United Nations International Children's Emergency Fund (UNICEF)"a HRBA is a conceptual framework for the process of human development that is

normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyze inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.(*What Is HRBAP?*, n.d.)". The United Nations Development Program (2003) explains that "in a HRBA, human rights determine the relationship between individuals and groups with valid claims (rights-holders) and State and non-state actors with correlative obligations (duty bearers). It works towards strengthening the capacities of rights-holders to make their claims, and of duty bearers to meet their obligations".

B. specific individual rights are being violated

In this section, the researcher analyzes the specific human rights that are threatened as a result of obesity. A right-based approach is derived from the idea that every human being is a holder of rights by virtue of being human. A 'right' is something which helps individuals to live with dignity and there is a clear difference between rights against needs and the rights against charity(Kapur & Duvvury 2006). Universal Declaration of Human Rights (UDHR) is the main international document pertaining to the human rights. Later, the United Nations drafted two key covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which recognized all types of human rights and obliged state parties to take measures to implement those rights in their respective jurisdictions.

The following rights, among those recognized by various international instruments, may be considered violated by consuming an unhealthy diet that leads to obesity.

1) Right to health

The right to health is a fundamental human right that underpins all other human rights. Every human being has the right to the best possible health, which is necessary for living a dignified life.

This crucial right is acknowledged in a number of international documents. As the core document right to health is mentioned in the Article 25 of the UDHR as "Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services". By providing a most comprehensive definition the ICESCR recognized thus right in the article 12.1 stating that, states parties recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", while article 12.2 set forth, by way of illustration, an amount of "steps to be taken by the States parties ... to achieve the full realization of this right". Further this right also mentioned in the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (article 5 (e) (iv), Convention on the Elimination of All Forms of Discrimination against Women of 1979 (articles 11.1 (f) and 12) and Convention on the Rights of the Child of 1989 (article 24).

The Committee on Economic, Social, and Cultural Rights (CESCR) issued General Comment 14 to expand on article 12 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), stating that the right to health is an inclusive right that includes not only timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.

Obesity has obviously reduced people's enjoyment of their right to health. Obesity, as discussed in the introduction chapter, has resulted in a slew of NCD's and has a negative impact on both physical and mental health. It indicates that the availability of food in and of itself is insufficient for the enjoyment of the right to health; only food that is safe for human consumption leads to the attainment of the standard of health.

2) Right to food

The right to food must be distinguished from the right not to starve. It is an all-inclusive right to an adequate diet that includes all of the nutritional elements that a person needs to live a healthy and active life, as well as the means to access them.(De schutter- special repaourter report submitted to the General Assembly- 26-12- 2011). Food security is defined by the Food and Agriculture Organization (FAO) of the United Nations as the situation where "all people, at all times, have physical and economic access to sufficient, safe and nutritious food necessary to meet their dietary needs and food

preferences for an active and healthy life" (FAO, World Food Summit Plan of Action, para. 1 (1996)). One of the most important aspects of the right to food's history has been the identification of hunger as the fundamental cause of malnutrition. However, the scope and definition of the term "right to food" has varied over time. Currently, in the enjoyment of the right to food, the quality of the meal is just as important as its adequacy.Right to food is also recognized in the main documents such as UDHR and ICESCR. The Article 25 of the UDHR discuss the right to food in the context of an adequate standard of living and it states that and mentioned that; "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, ……".

Article 11 of the ICESCR is the major article which describes the right to food in details. It provides that; "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food…….. " ICESCR section is also more focused on the adequacy and it spell out obligations for state parties to take action to eradicate hunger in their respective jurisdictions. Randolph, et al, (2012) emphasis that while Article 25 of the UDHR identified right to food as a one aspect of right to a standard of living adequate to ensure the health and wellbeing the Article 11 of the ICESCR goes beyond identifying the right to food as an aspect of the right to an adequate standard of living and articulates two separate, but related norms: the right to adequate food and the right to free from hunger.

The General Comment no.12 issued by the CESCR in 1999 for the elaboration of the meaning of right to food and in this document right to food was defined in broader manner which opening the path ways to the quality. It stated that; 'The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture....' is important defining the right to food. In a broader sense this interpretation required both quantity and quality foods to be available and accessible and since this study is mainly focused in the area of quality of food and the quality has two folds. That is, food should contain a mix of nutrients for physical and mental growth, development and maintenance and food should be free from adverse substances. The unhealthy diet that leads to obesity belongs to the first part of the definition as this type of diet mostly consists with only fat, sugar and simple carbohydrates which are considered to be more dangerous to human health.

3) Right to life

The right to life is a first-generation right, as stated in article 6 of the International Covenant on Civil and Political Rights (ICCPR), and it is also acknowledged in article 6 of the UDHR. Obesity has a direct link to human health, as stated earlier in this research article, and with the emerging results of the Covid 19, it is a well-established truth that obesity has invaded individuals' right to life. Obesity-related ill health can shorten your life expectancy; hence it could be claimed that there is room to address this issue under the right to life definition. Further in General Comment 36, the Human Rights Committee, which is the treaty body provided for under the ICCPR, insists that the right should not be interpreted in a restrictive manner and that it should concern the inclusion of individuals to be free from acts and omissions intended or anticipated to cause unnatural or premature death. It further provides that States Parties should take effective measures to address the general conditions in society which are likely to give rise to direct threats to life or to prevent individuals from enjoying their right to a dignified life. Actions taken to reduce widespread hunger and malnutrition, as well as efforts meant to ensure persons have timely access to essential commodities and services, such as food, may be included in these broad terms and conditions.

4) Other related rights

In addition to the rights listed above, obesity has the potential to violate or jeopardize some of these rights. Obesity has a societal stigma which has decreased the level of enjoyment of rights such as the right to non-discrimination, right to education, right to privacy and freedom of associations.

C. State party obligations to minimize such violations

The distinctive difference between international treaties and human rights treaties is that individuals are the primary beneficiaries of a human rights treaty. Human rights conventions also place an inherent responsibility on the part of the state party as return. Once a country ratifies international human rights conventions, it becomes a State party to the Convention. Accordingly, state parties are bound by the obligations imposed on the State Party by that

treaty. The manner in which these bonds are implemented in a country depends on whether they follow monism or dualism. A country that pursues monist approach is bound by that international law as soon as it ratified a treaty, and a country that follows the dualist approach enacts that responsibility only after the enactment of an enabling legislation that makes it possible. However, despite their dualism, the state party has an unavoidable responsibility as it has demonstrated to the international community its country's intention and commitment by ratifying the Convention. This duty of a State Party, however, mainly applies to the government and its affiliates. Not only that, but every social organization in the country, including non-state actors, is also responsible.

State party obligation may be divided into two main categories at the initial level, such as specific obligation and general obligations. While the general obligation understands under the broad definition given to the Article 2 of the ICESCR the specific obligations discuss under the respect, promote and fulfill.

The general obligation of states to progressively realize the right to food can be find in the Article 2 of the ICESCR as follows.

"Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

By evaluation main three sub- obligations can be identified as; taking all appropriate steps, achieving progressively the full realization, maximum of its available resources and following the principle of non- Discrimination

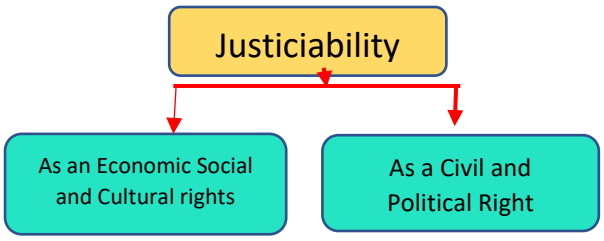
'Take all appropriate steps' required state parties to act in a way which help people to enjoy and fulfill their rights mentioned in the ICESCR. The phrase 'progressive to full realization' means that certain steps must be taken immediately in order to fully realize the right to food, while others are taken more gradually. The term 'maximum of its available resources available' defines providing a responsibility for states to take steps using their own resources and those of the international community to realize the right to food for the citizen.

In line with the specific obligation the term 'respect' requires the State Party to refrain from interfering with the existing level of enjoyment of the rights and to guarantee the existing entitlements. The obligation to 'protect' imposes on the authority's positive duties. It requires the State, by implementing an effective regulatory framework to ensure that individuals or enterprises do not deprive individuals of their human rights. The obligation to 'fulfil' basically had main two components (facilitate and provide) and another component (promote) was later added by the General comment 15 of CESCR (Paragraph 25). The duty to 'facilitate' means that the State must proactively participate in activities aimed at strengthening the access and the use of resources and means by citizens to ensure their livelihoods, including food security and safety. Where an individual or group is unable, for reasons beyond their control, to enjoy the right to safe food by the means at their disposal, States have a duty to 'provide' directly with that right.

D. Intervention strategies to minimize the harm

1) Under the human rights perspective;

To provide the necessary protection, it is vital to allow the justiciability of a human right in a certain jurisdiction. The concept of justiciability always emphasizes an individual's ability to assert a right before a judicial body, which can determine the case and establish the steps to be taken to remedy the violation (Courtis,2008). In nutshell the justiciability contains, individual's ability to claim the right responsiveness of judges to that claim (Gloppen, 2005), and possibility of having an effective remedy (Gloppen, 2005). As previously stated, the right to eat safe food is inextricably linked to the right to health and the right to food. It is crucial to note, however, that both of these rights have traditionally been classified as non-justiciable rights because they fall under the area of economic, social, and cultural rights. Another way to apply justiciability is to see if there is a chance of claiming this obesity problem under the specific right to life, which is regarded a civil and political right.



The right to safe food and the right to health must be codified and acknowledged within the provisions of the constitution to enable justiciability as a self-standing right. Particularly right to food has been stipulated in few countries like South Africa (Article 27), Brazil (Article 6, amendment 2012) and Mexico (amended 2010). Despite the fact that the initial recognition was adopted to address the issue of having a minimum food intake for persons, with the increasingly broad meaning given to the right to food, it is now implicitly acknowledged that the right to food requires the consumption of quality food. As a result, under the aforesaid provisions, there is a potential of making a claim for the availability of foods that are not healthy for human consumption.

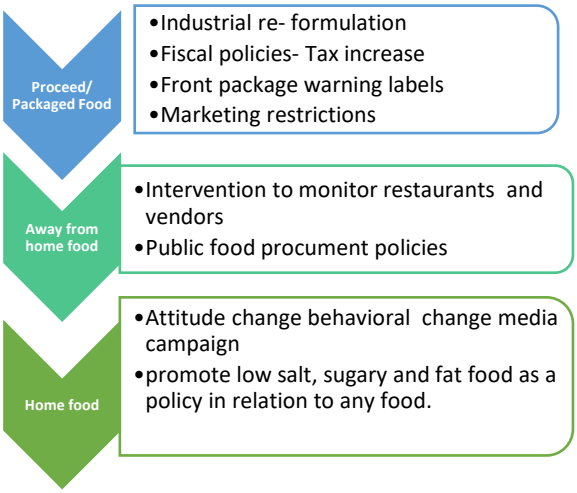
Some countries, such as Sri Lanka, Bangladesh, and Nigeria, have made these rights available within the purview of directive principles of state policies. Even if it appears that the rights are non-justiciable because they are covered by directive principles, judicial interpretations of such directive principles are possible. The Indian Supreme Court, for example, concluded in the case of *Olga Tellis v Bombay Municipal Cooperation* that "the directive principles, albeit not enforceable by any court, are still important in the government of the country."

Another strategy to claim justiciability is to support the interpretation with other recognized rights, such as the right to life. There are numerous examples of law created in this manner in various jurisdictions. The Indian Supreme Court declared in the case of *Francis Coralie Mullin v Administrator* that "the right to life encompasses the right to live with human dignity and all that goes along with it, namely, the bare necessities of life, such as adequate nutrition.". The supreme court of Bangladesh interpreted the right to life provision in the constitution to include the state's obligation to remove threats posed by powdered milk that contain unacceptable amounts of radiation in the case of *Dr. Mohiuddin Farooque V Bangladesh and Others*. The court went on to say that the 'right to life' encompasses the preservation of an average human person's health and natural longevity, which are being challenged by advertising strategies.' In the case of *G v An Board Uchtala*, an Irish court ruled that "right to life" means "the right to be born, the right to preserve and defend, and the right to have that life preserved and defended, and the right to maintain that life at a proper human standard in matters of food, clothing, and habitation."

Reiterating the link between the consumption of healthy foods and the reduction of obesity, it can be concluded that a case based on the right to life could be successfully argued. The United Nations Human Rights Commission (OHCHER) and the FAO have both stated that under the state party obligation, states must ensure that food put on the market is safe and nutritious, and that states must adhere to food quality standards. One of the other supporting grounds is that the right to consume safe food, or, in other words, that the accessible food must be safe, is also considered a core state party obligation, and that this right to consume safe food is now considered a part of customary international law by the states or closer to obtain it. As stated in the introduction section of this study, a significant number of people die every day around the world as a result of NCDs caused by obesity. This is analogous to the Covid -19 pandemic, where obese people with NCDs account for a larger percentage of mortality.

2) Effective other actions that can be brought to provide a safe food for individuals;

While the human rights approach provides a solid conceptual foundation for people's right to obtain good food in order to stay healthy, it is also critical to identify prompt specific actions that can be taken to reduce the harm caused by poor diet. This can also be seen as a way to meet the general state obligation of "taking all steps," which requires states to pass legislation and undertake economic, financial, educational, administrative, and social changes. The following are the steps that can be taken.



In the first instance, industrial re- formulation of foods at the process and packed level is critical to address. It is critical for industry owners to recognize when sugar, salt, and/or fat levels are above the acceptable levels and to re-formulate their products to bring them down to a healthy level. This can be done by setting various goals for each year, and it should be emphasized that while some industries do this on a voluntary basis, in some countries it is mandatory. For example, the United Kingdom uses a voluntary re-formulation technique to address this problem, but Argentina uses a mandatory re-formulation method. Another way states can drive industry reformulation is by allowing fiscal policy and labeling requirements to be used in a way that threatens the industry that produces unhealthy food that exceeds the recommended sugar, salt, and fat levels. Labeling laws, such as a back label, inform consumers that a particular food item contains unhealthy levels of sugar, salt, and/or fat, and thus encourages businesses to re-formulate their products to match the new criteria. Furthermore, permitting the rule that requires them to mention the amount of sugar, salt, and fact in each product is critical. Marketing and advertising are also essential factors in drawing customers, particularly children, to these junk meals, and it is critical that the state regulates the marketing and promotion of foods rich in sugar, salt, and/or fat.

Some countries have used fiscal policy to raise the price of unhealthy foods. Portugal, Mexico, and Hungary are among the few nations that have effectively implemented this high tax on sugary goods and seen a reduction in the volume of sugary food sales. Beyond the industry, these healthy habits must be practiced at both the home away from home food production and the home food production levels. As a policy, each level of person should support healthy eating over unhealthy foods. It is especially critical to educate society about the health dangers associated with a poor diet, which can lead to obesity and, ultimately, early death. In this context, attitudinal and behavioral change are critical in establishing a healthy eating culture at the grassroots level.

V. CONCLUSION

To summarize, the interpretation of the right to food has progressed to the meaning of the right to safe food, and it is now a well-established fact in the human rights discourse. As a result, the human rights-based approach protected individuals from pursuing initial remedial actions as a result of the state party's delay in taking action. There is a potential of taking action under the right to life if battling against social injustice as an economic, social, and cultural right fails. As a result of the state obligation outlined in section 2 of the ICESCR to take action, there are particular activities that states should take, and everyone as a society has a responsibility to work together to defend our collective health.

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AUTHOR BIOGRAPHY

Ms. M.K.Geethani Jeewanthi obtained her LL.B and LL.M Degrees from the Faculty of Law, University of Colombo and serving as a senior lecturer at the Department of Legal Studies, Open University of Sri Lanka. She has also completed the Post Graduate Diploma in Criminology and Criminal Justice offered by the University of Sri Jayawardhanapura. Currently she is reading for her Mphil/PhD at the Faculty of Graduate Studies, University of Colombo.

Ms M D Kumudunie Kaneshika obtained her BSc. in Physiotherapy Degree from the Faculty of Allied Health Sciences Unit, Colombo University and serving as a Senior Physiotherapist at MJF Charitable Foundation, Moratuwa. She has completed the Post Graduate Diploma in Health Development and Certificate Course in Postgraduate Research offered by the Faculty of Medicine, University of Colombo.

Legislating the Principle of Best Interest of the Child: The Sri Lankan Standpoint

IK Munasinghe

Faculty of Law, General Sir John Kotelawala Defence University, Sri Lanka

ishara.munasinghe@kdu.ac.lk

Abstract - Children are the most precious group in every society and owe the responsibility of creating the future world. It is the utmost duty and the liability of a state to protect the rights of the children with special consideration towards resolving their concerns to secure their best interest. The principle of the best interest of the child shall be the paramount consideration towards achieving and securing their rights in different circumstances. This study intends to explore the legal adequateness of legislating the principle of the best interest of the child in Sri Lanka, in par with the international standards safeguarding the rights of the children. The methodology adopted in the study is a combination of black letter methodology and comparative research methodology along with an analysis of the international standards coupled with the comparative jurisdictions, as appropriate. Further, the qualitative approach was employed to analyse the primary and secondary data of the study. Finally, the study critically assesses the standards of relevant legislation attempts of legislating the principle of the best interest of the child in the domestic context.

Keywords— best interest, child, legislating, rights

I. INTRODUCTION

The principle of best interest of the chid has mostly been a tool developed by the judicial activism in par with the intenational, regional and domestic legal and social norms of a particular state, in order to secure the rights of chidren. On the other hand, it lays the foundation to secure the minimum level of protection that required to be offered for the children in crisis of their rights. There has been much attempts taken by the judiciary and other administrative means to uphold the same in most of the jurisdictions but most of the states are diverting the said approach of pacticing the best interest principle into a proper legislative enactments as appropriate. Sri Lanka has more of towards incorporating the principe in to the different legilations in order to secure the justiciability of the rights of the children.

II. RESEARCH QUESTION AND THE METHODOLOGICAL APPROACH

The study indends to inquire the level of legislating the principle of best interest of child in the selected Sri Lankan statutes enacted between 2000-2009, in terms of safeguarding/upholding the rights of the children.

The study employs the doctrinal research methodology to elaborate the context where the qualitative research method is used to gather the relevant data for the quary. Domestic legislations including the Constitution along with the few selected statutes, International instruments, state party report submitted to the treaty body and the concluding observations received from the treay mechanism were used as the primary data of this study. Books, journal articles and reports by the government/experts etc. were analysed as secondary data in order to unpack the reseach question.

III. PRINCIPLE OF BEST INTEREST OF THE CHILD: UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (UNCRC)

UNCRC (1989) requires '[e]very legislative, administrative and judicial body or institution ... to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions or actions'which upholds the paramount considerationof the best interest of childrens in every concern. Further, the Article cover the wide range of actions undertaken by 'public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'. (UNCRC, Art.3). The same had been explained by the General Comment No 14 as the the best interests

principle operates as both a substantive right and an interpretative device while emphasis added on the level of obligation incorporate of the Article 3(1).

According to the Committee, Article 3(1) 'creates an intrinsic obligation for the States, is directly applicable (self-executing) and can be invoked before a Court'. The Committee also acknowledged the role of Article 3 as an interpretative legal principle, observing that '[i]f a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen'. Additionally, Article 21 of the UNCRC entails states to ensure that the best interests of the child shall be the paramount consideration in adoption cases (Pobjoy, 2015). Therefore, scholarly urgument has been developed that the the level of establishing the prinipcle of best interest of child created two different dimentions with the interpretaions of the Article 3 and 21 of the UNCRC (1989).

On the other hand, the perception of best interest as a 'primary' standard of concern may encourage the exercise of discretion with awareness of the dynamics of the child's own environment. Making children's interests a 'primary' consideration will thus be useful in creating sensitivity to the need for a holistic perception of the child's interests, without the child's interests becoming the sole concern. (Skelton, 2019)

It therefore follows that a child's best interest will be of supreme importance when considering an issue affecting a child's interest. It could therefore be argued that the use of the term "paramount" means that in weighing up competing interests, the scales must tip in favour of the child. (Skelton, 2019). It shall notworthy to remind the Convention does not provide a definition or a list of factors that would constitute the best interest of the child. Some commentatorsargue that this is understandable as a list would be limiting since eachfactual situation determines in itself which factors are to be considered in the child's interest (Robinson,2002)

IV.UPHOLDING THE BEST INTEREST OF THE CHILD: THE SRI LANKAN EXPERIENCE

A. The level of undertaking the UNCRC obligations towards establishing the protection of the rights and best interest of the children

Sri Lanka ratified the UNCRC on July 12, 1991 by introducing Children's Charter in Sri Lanka (hereinafter referred as CC) is a guideline on rights of the child protection inside the state. Moreover, it is the responsibility of the state to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, inquiry or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents or guardians shall be gauranted under Article 20 of the CC which is par with the Article 19 of CRC.

B. The level of undertaking of the protection of the rights of the children under the supreme law

The Sri Lankan legal standards promote the similar legal ideology of international standards towards the children. Therefore, the Constitution provides a space to enact any special provisions being made by law, subordinate legislation or executive action for the advancement of children (Constitution of Sri Lanka 1978, Art. 12 iv). Above Constitutional provision shall be read with its Articles of 27(12) on state to recognize and protect the family as the basic unit of society and Article 27 (13) on the State shall promote with special care the interest of children and youth so as to ensure their full development, (physical, mental, moral, religious and social) of the Chapter VI Directive Principles of State Policy and Fundamental Duties.

C. Justiciability of the best interest of the children under the other statutoary means

The UNCRC Committee (1995) recommended, that Sri Lanka shall harmonize its national legislation with the provisions and principles of the Convention at the stage of submission the initial state party report submitted to the trearty body. Further, it was emphasised the necessity of refelecting principles relating to the best interests of the child and the prohibition of discrimination in relation to children in domestic law, and ensuring the validity of justiciability of those of standards (CRC/C/15/Add.40, para 23,1995)

There has been continuously recommended by the UNCRC Committee, the State party (Sri Lanka), to ensure the domestication of the Convention on the Rights of the Child in its national legislation so that all of the principles and provisions of the Convention can be applied in courts. CRC/C/LKA/3-4,para 10, 2010)

Therefore, a requirement of the legistating the principle of best interest of the chid had been emerged and the domestic legislature has been actively contributed to the fillfill the same objecteive

with introduting many statutatry mechanisms other than the traditional aspects of custoay, adoption and guardianship matters of the children, divorce of parents coupled with maintenance.

V. LEGISLATING THE PRINCIPLE OF BEST INTEREST OF THE CHILD: AN ASSESEMENT OF SRI LANKAN STATUTARY DIRECTION

As per the terms of the Aticle 3 of the UNCRC, as previously mentioned, the application of the principle of the best interest of the child shall be incoppotated to an enactment after concening how children's rights and interests are or will be affected by the introducing the said legislation. Therefore, the it is wothy to scrutiny the justicialility of the principle of best interest over the words of the few legislative attempts taken by Sri Lanka parliament between 2000- 2009 beyond the traditional discussions of best interest of children.

A. Employment of Women, Young Persons and Children (Amendment) Act, No. 8 of 2003

Present amendment to the Employment of Women, Young Persons and Children Act of 2003 which strengthened child labour law by inter alia increasing the minimum age of employment from 12 to 14 years, while establishing the prohibiting the employment of children under age of 14. This law guarantees the best interest of the childen in terms of Article 3 of the UNCRC, while enhancing the sentence for violation of this provision by the people of the state.

B. Citizenship (Amendment) Act, No. 16 of 2003

Enacting this law relating to the citizenship remarks a revolutionist approach towards the right of acquiring nationality/citizenship of the children which amended the previouse law as enabling the childen to acquire nationality from both parents. Under the previous law it was only the father who was able to pass on Sri Lankan nationality to children which led to discriminate the children as per the terms of the principle of best interest of the child.

C. Tsunami (Special Provisions) Act, No.16 of 2005

Tsunami incident in 2004, was one of the most crucial natural disasters occurred in Sri Lanka which coursed the massive personal and poperty crisis among the people lived in the coastal areas of the country. Lots of children were experiencing very vulnaral due to the lost of parents, companionship, security, custody along with the maintenance and non realization of the other social/cultural/religious rights which they were used to enjoy. However, the statues laid the legal foundation for the childen who were valunerable to be secured their best best intests of custody, foster care, adoption matters with the active parcipation of the responsible authories. Further, the law guarunted the monitoing and sanction process of relaizing the rights of the Tsunami affected children to secure their best interest.

D. Prevention of Domestic Violence Act, No. 34 of 2005

Domestic violence laws laid the foundations to secure the best interest of the children from the physical and phycological violences occure due to the actions and/or omissions of the family members inside or the outside of the residence. The statues provided the space to the children to raise their voices againsts the domestic violence or immendent violences which shall be affected to their social, cultural, religious etc. rights. The law enables to protection orders to be urgently obtained to safeguard those suffering and at risk of domestic violence including both in nuclearand extended families through the judicial mechanism.

E. Penal Code (Amendment) Act No. 16 of 2006

The aforementioned, penal law amendement drives through strengthening the law against child trafficking including that by electronic media.The new section 360C adopts the wide definition of trafficking in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons. The new section 358A has criminalized outstanding worst forms of child labour as stipulated in the International Labour Organization (ILO) Convention No. 182: debt bondage and serfdom, forced or compulsory labour, slavery and engagement or recruitment of children in armed conflict. Therefore, the statute attempted to incorporate the principle of best interest of the child while par with the intenational standards.

F. International Covenant on Civil and Political Rights (ICCPR) Act No. 56 of 2007

ICCPR statue provided that the best interests of the child shall be of paramount importance in all matters concerning children whether undertaken by courts, administrative authorities, legislative bodies or public or private social welfare institutions, and strengthened protection for children in respect of birth registration, name and nationality and legal assistance. This enactment remarks the outstanding principle reconginition to the best interest of child in Sri Lanka

VI. CONCLUSION AND THE WAY FORWARD

Understanding and interpretating princple of best interest of the child in the contexts children arises nature of sui genaris which of be the core essence of upacking the legal issues ahead, while guaranting their rights. However, the disputes of the children shall be obviousely taken up in the court houses as of using the best interest as the tool to resolve the matter. Further, it is more precise to observe the unimity definition for the child in all abovementioned statutary intrsuments which make the judiciary moe comfortable in applying the law into the issues refered to the court houses, while promorting and/or ensuring the uniform application of the best interest principle through statutay means.

The following social and legal recommendations shall be made in oder to ensure the substantive equality of applying the principle of best interest through legislative instruments.

It is vital to promote education on rights for the school children while enhancing the parenting education for the parents and teachers.

Educating members of the legislature, members of the Department of Police, Judicial Officers, probation officers and all those involved in juvenile justice on the way to handle the issues reported relating to the children shall be enhanced.

The child care authories shall encourage to actively involve in resolving the matters in par with establishing subtational and procedural equality to the victimized children.

Introducing immediate amedments/rectifications to the exising laws which shall not have the refelects of the paramount consideration of the best interest of the children.

Necessity of ensuring compulsory transparent monitering processes and/or any other measures which had been granted to the victimized children in order to secure their best interest.

State party to ratify the CRC and the Optional Protocol to the CRC in the form of enable statutes as recommended by the treary body of the UNCRC.

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Author is a Senior Lecturer attached to the Faculty of Law, KDU, Sri Lanka. She holds LLB (Hons)(Clombo), LLM (Wales, UK), MHR (Colombo) and PgDip. in HR(Colombo).

Environmental Damage Caused by Shipwrecks in Sri Lanka: A Legal Analysis

S Hansani

Attorney-at-Law, Supreme Court of Sri Lanka

samadhihansani20@gmail.com

Abstract - Sri Lanka which is geographically located at the centre of international shipping lanes has had to frequently deal with shipwrecks. The X-Press Pearl shipwreck can be identified as an irreversible damage caused to the territorial sea. This research is expected to ascertain the effectiveness of the domestic laws in addressing the impacts of shipwrecks on marine biodiversity, its compatibility and inter-relationship with international laws governing the same and to identify the loopholes in the domestic law in conserving marine environmental resources against the environmental disasters linked with shipwrecks. The research methodology includes the black letter approach based on international conventions and case laws as primary sources and journal articles, books, web articles as secondary sources. The Marine Pollution Prevention Act, which was enacted to protect the marine system. provides for criminal and civil liability for those who pollute the ocean. The Coastal Conservation and Coastal Management Act can be indirectly identified as a unique act that includes provisions on the ocean and criminal liability that can be imposed on an offense committed under the Act. The National Environment Act deals with the protection of the territorial sea. Sri Lanka has not ratified vital conventions on maritime security and has lost the protection that comes with them. The failure of domestic law to be strengthened by International Conventions is a serious weakness. The research recommends the need to ratify International Conventions and thereby to take steps to strengthen domestic law including in the Constitution of Sri Lanka for protection of the marine environment and to establish a special court or tribunal for matters related to shipwrecks.

Keywords— shipwrecks, domestic laws, international conventions

I. INTRODUCTION

Shipwrecks are a global problem and pose little to quite harmful pollution threats. Sri Lanka which is geographically located at the center of International Shipping lanes has had to frequently deal with shipwrecks within its maritime boundaries particularly in recent years. The most recent of such incidents is the grave and irreversible damage caused to the Sri Lankan marine and coastal ecosystems and the animal communities by the MV X-PRESS Pearl ship that recently wrecked in the territorial sea of the country. This research expects to ascertain the effectiveness of the domestic laws in Sri Lanka in addressing the impact of shipwrecks on marine biodiversity and its compatibility and Inter-relationship with International Laws governing the same. The research also intends to identify the loopholes in the domestic law in Sri Lanka in conserving invaluable marine environmental disasters linked with shipwrecks.

Marine pollution has not obtained significant consideration by the public although it could adversely effects to the whole environment in terms of climate change, global warming, and degradation of natural resources. The research limits only to vessel source marine pollution, limits MV X-PRESS Pearl ship matter , United Nations Convention of Law of the Sea (UNCLOSE) ,The International Convention for the prevention of pollution from the ship (MARPOL) and International Convention on Liability and carriage of Hazardous and Noxious substances by sea -1996 ,in terms of International legal Instrument limited to Marine pollution prevention Act No.35 of 2008, Coast Conservation and Coastal Resource Management Act No.57 of 1981(Amended),National Environment Act No.47 of 1980 of Sri Lanka in terms of domestic legal instruments and limited only to the data obtained through books, journals, web articles and case laws.

The research expects to achieve the objectives such as ascertaining the effectiveness of the domestic law in Sri Lanka in addressing the impacts of shipwrecks on Marine biodiversity and its compatibility and Inter-relationship with International Laws governing the same. The research also intends to identify the loopholes in the domestic law in Sri Lanka in conserving invaluable Marine environment resources against the environmental disasters linked with shipwrecks.

II. METHODOLOGY

The Methodology which is used in this research is Black letter methodology as this was doctrinal research. The Research base on statutes case laws as primary sources and journal articles, books and web articles as secondary sources. The research also uses the International and comparative research methodology based on International Conventions and case laws as primary sources.

III. DISCUSSION & CONCLUSION

Marine Pollution Prevention Act No.35 of 2008 is the currently existing law related to Marine Pollution in Sri Lanka. Marine Pollution Prevention Act for protecting Sri Lanka waters from pollution. Although there are provisions to control pollution from ships, harbors /ports and any facility used by ships and offshore petroleum exploration projects and to deal with offenses, imposing both Criminal and Civil liabilities for offenders. The Act section 37 provides for the prevention, reduction and control of pollution in Sri Lanka waters and gives effect to International Conventions for the prevention of pollution of the sea.

The emergence of this Act resulted from signing the United Nations Convention on the Law of the Sea (UNCLOS) and the International Convention on the prevention of pollution from ship 1973 modified by 1978 and 1997 (MARPOL) by the Sri Lankan government as a sovereign state.

Marine Pollution Prevention Act sets the legal background to national jurisdiction for enforcement of UNCLOS and MARPOL. The Act mentions that it is for prevention, control and reduction of the pollution of the marine environment of Sri Lanka to prevent the vessel source marine pollution emerging through various International and local legal instruments.

Article 06 of the Act states that Marine Pollution Prevention Act shall implement the provisions of the act in an effective and efficient manner by formulating and executing a scheme of works for prevention , reduction ,controlling and managing of marine pollution arising out of ship-based activity conducting researches for the preservation of marine pollution take every measure to preserve the territorial waters of any other maritime zone of Sri Lanka ,providing adequate and effecting reception facilities, recommend adherence of International conventions to prevent marine pollution ,formulating and implementing the national plan, regulations, etc. Section 26 and 34 provide Criminal and civil liability for those who pollute the ocean.

According to the legal provisions of the coastal conservation and coastal Resource Management Act section 35A, the police officer may without an order from a Magistrate and without obtaining a warrant arrest any person reasonably suspected. According to section 35AA of the Act, a person who commits an offense under this act is guilty of a criminal offense.

Part IV B of the National Environment Act discuss “Environmental Quality” under section 23H (1) it is stated that “no person shall pollute any inland waters of Sri Lanka or cause or permit to cause pollution in the inland waters of Sri Lanka so that the physical ,chemical or biological condition of the waters is so changed as to make or reasonably expected to make those waters or any part of those waters unclean, noxious, ,impure, detrimental to the health, welfare, safety or property of human beings, poisonous or harmful to animals, birds, wildlife, fish, plants or others forms of life or detrimental to any beneficial use made of those waters.” It discusses the pollution of inland waters of Sri Lanka Section 23H (3) discusses the penalty for pollution of inland waters in Sri Lanka. According to this section, the cost of the harm polluters will get the same fine, therefore, there is no way to identify the actual cost of harm.

Sri Lanka has been ratified and adopted the UNCLOS and MARPOL conventions. Under the part IIX of UNCLOS ,emphasizes the obligations of states to protect and preservation of Marine Environment including the measures of preventing reducing and controlling marine pollution ,global and regional cooperation of states for prevention of marine pollution, technical assistance ,monitoring and environmental assessment ,International rules and National legislation ,enforcements, safeguard, responsibility and liability, sovereign immunity, obligations under other conventions on the protection and preservation of the marine environment.

MARPOL –Article 1 clearly states that parties to the convention are bound to prevent marine pollution and act according to the convention in the cases of vessel source marine pollution. According to concerned International legal instrument states are obliged to protect marine environment as signatory parties to those conventions. Article 235 of UNCLOS mentions that states are responsible for protecting and preservation of the marine environment.

The most recent to the Sri Lankan marine and coastal ecosystems by the MV X-PRESS pearl ship that recently wrecked in the territorial sea of the country. The ship was carrying a consignment of hazardous chemicals, including Nitric Acid, Ethanol, Dust urea, grilled urea, Density polyethylene…etc. With the sang of the ship the released of the chemicals is a serious risk to the ocean and the coastal ecosystem.

In view of the recent shipwreck, we have not ratified any of these related International Conventions. Sri Lanka has not signed the International Convention on Liability and Compensation for damage in connection with the carriage of Hazardous and Noxious substances by sea 1996.That is why Sri Lanka is losing the ability to secure those conventions. The Law has addressed oil spills in the event of shipwrecks. But when a ship carrying chemical containers crashed no attention was paid to the situation. International legal instruments have not been completely implemented in Sri Lanka in relation to the vessel source marine pollution.

The Polluter Pays principle (PPP) is the main concept relating to Environment Issues. This principle was identified by principle 16 of the Rio Declaration. It spells out that the person or the authority who is involved in polluting the environment should take responsibility for the cost of the harm. The case of *Cambridge Water Company v. Eastern Counties Leather* (1994) is a significant case to analyze the use of the polluter pays principle. An early version of the PPP was developed by the Organization for Economic Cooperation and Development ("OECD") in the 1970s in an effort to ensure that companies would pay the full cost of complying with pollution control laws and were not subsidized by the State. Therefore, it appears that the implementation of the PPP needs to amalgamate with other international environmental principles as well. Especially, the preventive action and precautionary principle are of utmost importance. Because prevention is the best mode to overcome environmental issues. Due to the gravity of the environmental harm, mere a fine might not sufficiently recover the actual loss. Consequently, the PPP needs to connect with a precautionary principle as well. Furthermore, it shows that the first step needs to be a precaution and the second step should be the PPP. Sometimes, we can use the PPP as a deterrent to pollution. Through the deterrence, the polluters might hesitate to harm the environment. Thus, it will simultaneously preserve the environment and environmental resources for future generations.

Currently, in Sri Lanka the judiciary has taken certain progressive steps to promote the Polluter pays principle, with the command-and-control philosophy. Especially in the *Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others (2000) 2 SLR. 243* (Eppawala Phosphate Mining case) Justice Amarasinghe said '…..Today, environment protection, in light of the generally recognized 'Polluter pays principle', can no longer be permitted to be externalized by economists merely because they find it too insignificant or too difficult to include it as a cost associated with human activity. *Wilpattu Case –CA WRIT 291/2015* court decided that "Court issues an order in the nature of mandamus ordering the 1st Respondent (Conservator General, Department of Forest Conservation) to take action to implement a tree- planting program under and in terms of the provisions of the Forest Ordinance No. 16 of 1907 as amended in any area equivalent to the reserve forest area used for resettlement of IDPs.

The Polluter pays principle has been recognized within the jurisdiction of the Supreme Court of India, which has held that 'along with the precautionary principle- the polluter pays principle is a part of customary international law'23. The *M.C. Mehta v. Kamal Nath24 (1997)* case extended the liability under this principle not only to compensate the victims of pollution but also to cover the cost of restoring the environmental degradation.

This study is able to understand some loopholes in the existing domestic legal framework relating to the prevention of marine environment pollution from vessel sources. The research expects to elaborate on those identified loopholes and recommend possible remedies to fill those gaps.

One of the loopholes is identified in the constitution of Sri Lanka. There was no provision to protect the marine environment. This research recommends including provisions relating to the marine environment. Secondly recommends establishing a special court or tribunal for such matters as currently

implemented through high courts of particular areas. Sri Lanka has ratified the most important conventions relating to shipwrecks. This failure is a serious weakness in our domestic law. Thirdly recommends ratifying the necessary International Conventions before the next disasters.

IV. CONCLUSION

This research could emphasize the importance of ratifying the International Conventions. This research explains the current legal framework to protect the marine environment and the loopholes of those existing laws and recommended solutions to fill the gaps.

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AUTHOR BIOGRAPHY

H. Samadhi Hansani Premasiri received the LL.B (Hons) degree from the University of Colombo, Faculty of Law in 2019 and working as an attorney-at-Law.

"Will Poseidon Meet Artimes?" An Analysis of the Applicability of Eco-Feminism in Achieving Environmental Justice in Sri Lanka

H Rathnamalala# and P Wijesooriya

Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka.

#rathn016@umn.edu

Abstract - This research aims at emphasising the need of women's representation and the participation in resolving contemporary environmental related issues in Sri Lanka. The main objective of the research is to examine whether there is a link between the less participation of women in resolving the contemporary environmental issues and the gross violations on the environmental rights in the Sri Lankan environmental law. The secondary objective is to analyse the paradigms of the above concept theoretically in light of the branches of eco-feminism and applicable environmental law principles. The study is based on the legal research methodology, which is a library based-secondary data analysis. The expected outcome of the research is to seek the possibility of utilizing the theories of eco-feminism to achieve environmental justice in Sri Lanka.

Keywords— environmental law, eco-feminism, female participation

I. INTRODUCTION

Forestry, environment and the nature itself have been accepted universally through motherly divinity since ancient times. It is mainly due to the in-depth relationship between women and the nature. In the ancient Asian culture, the trees and the seas (basically the nature) considered as it related to divinity. In ancient Greek mythology, goddess Artemis was recognized as the goddess of nature and forestry and was also consisted of the feminine nature of those elements. God Poseidon represents the sea, wars and aggressive masculinity. (Riordan, 2015)

Feminist legal theory (hereinafter referred to as FLT) could be recognized as one of the main philosophical schools of thoughts in the contemporary legal philosophy. (Minow and Verchik, 2016) Feminist legal theories emphasize the role of law in describing society and in prescribing change, while other types of feminist theory might de-emphasize or even question the role of law in these areas (Minow and Verchik, 2016), FLT has several sub-divisions such as the Equal Treatment Theory, Cultural Feminism, Eco-Feminism and the Dominance Theory. In this research, the most applicable Feminist Legal Theory is Eco-Feminism. Eco-Feminism describes the women's rich and varied relationship with society and nature. (Minow and Verchick, 2016). Eco-feminism is a broad concept, eco-feminism has since flowered into a stunning array of variations, with emphases ranging from economics to spiritualism, from animal rights international Human Rights. The most recent and, perhaps, most promising version of ecofeminist emphasises the intersection of human oppression (sexism, racism, and so on) and environmental destruction (Minow and Verchick, 2016). Further, eco-feminism mainly has two divisions, namely, cultural eco-feminism and socialist eco-feminism. While both approaches reject the domination of those in power over the "other" (whether that other be woman or nature), they have distinctly different opinions about the best approach to take to subvert this power hierarchy and replace it with a new vision of social relationships (Hughs, 1995).

In framing their analysis, cultural ecofeminists place heavy emphasis on the historical links between women and nature (Hughes, 1995). In socialist ecofeminism, they link the exploitation of women is similar to the exploitation of the nature (forests, sea) as a result of capitalist economical system. Socialist ecofeminists, therefore, do not link the devaluation of women directly to the devaluation of nature; rather, they see these and other oppressions (such as class and race) as interlinked parts of a social system premised on construing difference as a basis for hierarchy (Hughes, 1995).

Environmental law (Herein after referred to as Env Law) looks at all the factors on an economy and its production and industry to assess its impact on the environment and propose regulations to reduce environmental harm. It is mainly considered with regulations and treaty agreements between countries, corporations, and public interest initiatives that promote the conservation of natural resources and enhance energy efficiency. Principle 1 of the Stockholm Declaration 1972 provided that "man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated". Even though a man has a fundamental right to use the environment for the economic development processes, it is the duty of the people and the governments to protect the environment by providing necessary rules and regulation to secure the environment for the future generation, which known as the 'sustainable development' under the environmental law principles.

In this aspects, it is indicated that both the FLT based ecofeminism and Environmental Law are focusing on a common destination in parallel roads as sustainable development as its outcome. Considering all the above theories, the authors discuss on the Environmental Law and its relationship with the ecofeminism in order to achieve environmental justice in Sri Lanka.

II. GENERAL INTERPRETATIONS BETWEEN ENVIRONMENTAL LAW AND ECOFEMINISM

Historical discrimination between genders has been recognised as the spot-light issue in all the sub divisions of FLT. In this part of the research, the authors focus on the analysis of the applicable of theories in the Env Law and Eco-Feminism and its impact on each other. For example, there is a link between the oppression of women and destruction of Mother Nature is recognized in the Eco-Feminism. Not only it has recognized the above relationship, but also it recognized the historical development between two branches of law. Even though it is mainly focuses on the western culture, as indicated above Minow and Verchick's description on the same affirms its universal application beyond borders.

III. ENVIRONMENTAL LAW AND APPLICABLE PRINCIPLES OF FEMINIST LEGAL THEORY

The Env Law has its own conceptual apparatus, in the sense that there is a set of principles and concepts that can be said to exist across the range of issues covered. For example, the polluter pays principle has a status as a principle or tool of sound environmental management and has an exclusive link to environmental law. This principle generally described an approach to the protection of the environment or human health that is based around taking precautions even if there is no clear evidence of harm from an activity or substance. This principle suggests that we could ban a pollutant suspected of causing severe harm even in circumstances under which there is no conclusive scientific proof of a clear link between the substances and damage. The concept of sustainable development is central to the recent and future development of environmental law and policy. The idea of sustainability, which indicates the state of something being sustainable in the long term, has always been considered as part of the system of land use and planning within the context of development.

On the other hand, though it is not acknowledged widely, may be due to the reason that of unawareness, the inceptors of Green Movements in the world are generally females. Among the many examples, American Environmental Justice Movement also was initiated by group of grass root level females, those who got together and shared their notes on ailments on contaminated well water or landfills that leached toxins into the ground (Minow and Verchik, 2016). Especially when kids were sick of Asthma or on allergic-related issues as a result of polluted environment due to factory-emissions. Not only in America, but eco-feminism got its recognition more prominent after Wangari Mathai won the Nobel Prize for the Green Belt Movement in Africa (Mathai, 2015). The Nobel Peace Prize Committee indicated that through this positive interference to the environment by African women, the concept of peace has been upgraded to a different dimension (Minow and Verchik, 2016). For example, this movement achieved its momentum, through indicating African women's unique attachment to the nature and especially to the forests and how the deforestation making a severe negative impact on the African women community.

Above indicated close relationship is applicable to Sri Lankan rural women as well. For example, traditional Sri Lankan village life was completely related to the nature, particularly to the forests and to rivers and streams. The way females handled the forestry resource were similar to contemporary criteria of sustainable environment. As indicated in the famous Sri Lankan lullaby:

ඉනට පළා-නෙලා ගෙනේ

අතට වෙරලු- ඇහිද ගෙනේ

බරටම දර-කඩා ගෙනේ

එයි අම්මා-විගසකිනේ

[Translation: "With herbs at her waist, wild berries plucked, and twigs for fuel, your mother shall come (from the jungles) to you soon] further note: it should not be misunderstood though it says that the load is heavy, as it is the amount an average woman could carry.

This is a clear indication from the folklore to affirm how much the Sri Lankan women's lives were attached to the forestry and to the nature. Also, in the Sri Lankan culture, it was famous for the Ayurvedic medicine. It is also directly linked to the nature and to the plants, in which people in the village got together in finding relevant plants or parts of the plants to cure a villager. However, Ayurvedic doctors, may be due to the reason of femininity and its generational long, ancient relationship to the nature.

Further, it should also be acknowledged as well as it could be taken an example for the female's interest in nature, though they are not rural women but highly educated academia. Female lecturers who specialized Environmental Law and teaching in the country's youngest Faculty of Law has initiated the Green Movement in Sri Lanka's only defence university under the guidance of the university authorities to bring a panacea to the infirmity of deforestation in Sri Lanka in their capacity. On the other hand, the rise of young female environmentalists in Sri Lanka against deforestation and destruction of nature symbolised by Ms Devani Jayatilake, the young woman Forest Officer, protesting against the destruction of very rare plant species on a development project for highways also a green light on female participation in protecting the nature.

Those examples are to indicate the in-depth relationship between females and the protection of nature. All the above illustrations indicate the in-depth relationship between the nature and women in all levels and in many spheres.

Reviewing the theoretical framework on the above situation, Ecofeminism, a concept that links environmentalism and feminism, can help decision-makers better understand the distributional implications of many environmental policies. (Lee, 2018). Therefore, this extraordinary relationship could also be utilize to bring women into the circles on activism to decision-making on the protection of the environment. Therefore, understanding of these legal philosophical approaches also inculcate a culture which utilises the better understanding of the need of women's unique relationship with the environmental related issues from grass-root level to the policy making levels in Sri Lanka.

Effective environmental policies must account for distributional inequity because the more resourceful party will more likely degrade the environment, and because the less resourceful party will disproportionately experience the harms (Lee, 2018). Ecofeminism can improve how we approach environmental problems, an area that deserves special attention because certain environmental harms might be irreversible on human timescales. (Lee, 2018) Therefore it is to be analysed the ways of incorporating the concepts introduced above as core-concepts of ecofeminism in the implementing process of the Environmental Laws in Sri Lanka.

As indicated at the onset, this research mainly utilises the doctrinal research methodology as it is the most suitable model to review existing legal literature on a library based secondary data analysis and to interpret the available data applicable to the relevant theories of the study. Further, due to this research's intangible and philosophical nature, it is limited to the library based, secondary data analysis, except for few instances which utilize the 'observation' method, in order to draw relevant examples from Sri Lankan culture to enrich the research findings.

IV. LAWS ON MARINE POLLUTION AND FEMINIST LEGAL THOERY

'Men, the aggressor of love and war' (Williams, 1982), as recognize by the Feminist theorists', men are the abusers of power. Eco-Feminists applies the same as a cause of massive environmental destruction, exploitation and pollution of the environment. Stereotypically, men are rated as aggressors, carriers of power and controllers of others through power of masculinity. This very nature of relative concepts seem to be applicable to the concepts of

environmental pollution and exploitation of resources without aiming at sustainability. On the other hand, as indicated in the introductory part, socialist ecofeminists emphasized the fact that as a result of Capitalist economical systems, both nature and women are being exploited. For example if it applies to the Oceans and Marine Pollution, the competitive capitalist countries are top the lists of dumping of waste into seas which results the imbalances of marine biology and destruction of the marine environment.

The closest practical application on the above theoretical framework could be shown from Sri Lanka. For example, Hikkaduwa Beach is well-reputed for vivid coral reefs which attract the local and foreign tourist, sight-seeing is carried out by glass bottomed boats in massive levels. These boats use Kerosene for fuel and emit the whole by product to the area of Coral reefs in the sea. As a result, Coral reefs which developed through centuries are now in danger. However, as indicated by eco-feminism, as a result of few aggressive competitive men, theoretical concepts on the need of preserving nature and resources for future generations and sustainable development goals are becoming an unachievable goals.

V. RECOMMENDATIONS AND CONCLUSIONS

Naturalism is often subjected to criticism by feminist legal theorists due to its utilitarianism on gender roles. For example, gender roles were assigned to mothers as home-makers and fathers as bread-winners, eminently with certain characteristics. Further, as mothers or as females, the assigned role is care-giving, tender and submissive. On the other hand, males were assigned the rough-tough characteristics such as aggressive, authoritative and assertive. On one hand, nature and the subjects of the Env L also recognized as of feminine nature since ancient times, therefore mankind understands it as exploitable.

Secondly, this very nature of assigned characteristics to women and nature are applicable in the same manner for destruction of nature, though it has subtle differences in naming, such as deforestation or marine pollution or illegal sand-mining which causes damages to river-beds or damaging wildlife. It is obvious that there has been a noble relationship between nature and human beings as it had been in the Red-Indian Era. However, in later stages, this noblest relationship was damaged to a certain extent, yet the relationship between women and nature remains intact. In an in-depth review, firstly in light of the radical ecofeminism this concept could be analysed; as female's tenderness or care-taker characteristics are often utilized in male-dominated societies for their betterment in utilitarian aspects. Likewise, nature's care-taking and tenderness towards human-beings have been overused and exploited by masculinity. Therefore, policy makers should implement the policies on the participation of females in all spheres to join hand the collective efforts to improve the current situation with governmental and non-governmental organizations in Sri Lanka.

Secondly, if analysed the same in light of the theory of Socialist ecofeminism, it could be evaluated in a different yet in relative manner. Men are of the competitive and aggressor characteristics according to the stereotypical role assignment by the society, therefore, in Capitalism, they are competitive in the ground of limited resources, this entails exploitation of resources if there is a need. For example, during the internal armed conflicts occurred in African region, whether it was the Rwandese conflict or whether it was the Sierra Leon, in those of which rape and sexual violence against women was utilized as a weapon in armed conflicts. In such instances, it was observed that females of those villages usually go to the forests close-by to pluck fruits or to bring firewood were attacked regularly as the attackers knew the relationship between those females to the forest. Therefore, during the process of Capitalism, the competitive men are the resource handlers and policy makers. In this aspect, they do not hesitate to exploit nature as it is considered as the closest yet untapped resource to mankind. Therefore, like the unequal distribution of resources in Capitalism, the destruction of nature occurs by some men who are very capable and powerful as well as competitive. However, its results have a negative impact on humankind regardless of gender.

Whether it is evaluated under the radical ecofeminism or under the Socialist ecofeminism, Sri Lankan environmental law violations seem to occur in both ways. The gaps in economic policy making, gaps in resource management and gaps in certain policy implementation in national levels leads to another significant gap that is the lack of principled female policy makers in the process. Therefore, considering the noble relationship between females and nature, the above gap should be fulfilled at governmental level. Therefore, when fulfilling the sustainable development goals, legal policy makers

must be aware on the ecofeminist theories on the harmful practices against the environment through Capitalistic economic policies.

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BIOGRAPHIES OF AUTHORS

Authors are lecturers in the Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana. They are Attorneys-at-Law and currently reading for their M.Phil/Ph.D.s in Law. Authors hold LLM and LL.B. (Hon) from the Faculty of Law, University of Colombo. Hasini Rathnamalala holds LLM in Human Rights Law (University of Minnesota Law School-USA) and her research areas are Human Rights Law, Jurisprudence and International Humanitarian Law. Padmaja Wijesooriya holds LLM in Intellectual Property Law (Faculty of Law, University of Exeter, UK). Her research areas are Intellectual Property Law and Traditional Knowledge.

For Reincarnation: An Analysis of the Application of the Polluter Pays Principle for Environmental Restoration in Sri Lanka

NKK Mudalige and AA Edirisinghe#

Faculty of Law, General Sir John Kotelawala Defence University, Sri Lanka.

#asanka.edirisinghe@kdu.ac.lk

Abstract - In May 2021, the Singaporean container ship 'MV Xpress Pearl' en route from India to Singapore caught fire and drowned in the sea around 9.5 nautical miles Northwest of Colombo with 1486 containers containing tonnes of hazardous and highly reactive chemicals and 325 metric tonnes of bunker oil aboard. The incident created an unprecedented and unimaginable environmental disaster with widespread spill over effects on the marine environment, species and resources. While some of these environmental damages could never be rectified, the most viable solution available to preserve the pollution ravaged oceans in Sri Lanka is making the polluter to restore the environment (at least to the most part possible) into its previous condition. Therefore, this paper seeks to analyse the application of the polluter pays principle in Sri Lanka to ascertain whether it can be used to impose a duty on the polluter for ocean environment restoration in the MV X-Press Pearl Disaster. This research is carried out using the Black Letter approach of research based on international conventions, legislations and judicial decisions as primary sources and books, journal articles, conference proceedings, theses and online resources as secondary sources. The paper concludes that the duty of the polluter for environmental restoration in Sri Lanka can be recognized by virtue of Chunnakam case and the Wilpattu case.

Keywords— polluter pays principle, restoration of the environment, Mv Xpress Pearl disaster

I. INTRODUCTION

On the 20th May 2021, the Singapore-flagged cargo vessel 'MV Xpress Pearl' enroute from India to Singapore caught fire while it remained anchored around 9.5 nautical miles Northwest of Colombo waiting to enter the harbour. According to a list obtained by the Centre for Environmental Justice under the Right to Information Act, No. 12 of 2016, at that time, the ship had 1486 containers containing tonnes of hazardous nitric acid, caustic soda, sodium methylate, lead ingots, lubricant oil and other highly reactive and inflammable chemicals, 78 metric tons of plastic nurdles, and 325 metric tonnes of bunker oil aboard. Fire fighters and the Sri Lankan Airforce were deployed to extinguish the fire, but notwithstanding their efforts, the fire, which was initially doused, ignited again and the ship burnt for nearly 10 days just outside the port of Colombo (BBC 2021, Perera 2021, Oceanswell 2021, Ground Views 2021).

MV Xpress Pearl had been an unprecedented environmental disaster, and its exact impacts are not known to the humanity, at least as of yet, since the ship, even nearly two months later, is still leaking oil into the ocean (Oil Leak from X-Press Pearl? Activists demand immediate action 2021). According to the scientists and experts, the area is home for thousands of marine life and the plastic nurdles will affect them through ingestion and entanglement; the pollution of the ocean will put the critically endangered and endangered animals further at risk, oil spillage will result in poor body condition, inflammation, reproductive failure, infections and the death of marine life, plastics and other debris can irreversibly damage and obstruct coral reefs and the list continues (BBC 2021, Perera 2021, Oceanswell 2021, Ground Views 2021, Oil Leak from X-Press Pearl? Activists demand immediate action, 2021).

While some of these environmental damages could never be rectified, the most viable solution available to preserve the pollution ravaged oceans in Sri Lanka is making the polluter to restore the environment (at least to the most part possible) into its previous condition due to two main underlying reasons. First, the damage occurred to the environment cannot merely be ignored, if did, its consequences will last for several millennia and some of the damages would even be permanent. Second, the cost of restoration of the environment cannot be imposed on the government parties who are dependent on the tax money of the people of the country. If did, it will

unfairly punish the general community by depriving them of the ocean resource at first, and then compelling them to bear the costs to restore it back to the previous condition with no fault of theirs. Therefore, this paper seeks to answer the question, whether the polluter pays principle as recognized in Sri Lanka can be used to impose a duty on the polluter for ocean environment restoration in the MV X-Press Pearl Disaster?

II. METHODOLOGY

The research was carried out using the black letter approach of research based on international conventions, legislations and judicial decisions as primary sources and books, journal articles, conference proceedings, theses and online resources as secondary sources.

III. DISCUSSION AND ANALYSIS

A. Polluter Pays Principle

The polluter pays principle embodies the simple idea that he who pollutes the environment shall bear the costs of such pollution. The first express reference to the polluter pays principle in the international level can be seen in 1972 Council Recommendation on Guiding Principles Concerning the International Economic Aspects of Environmental Policies of the OECD (OECD Legal Instruments, 2021). Polluter pays principle was thereafter incorporated in principles 21 and 22 of the Stockholm Declaration in 1972 and principle 15 of the Rio Declaration in 1992. The principle is one of the most widely accepted and respected international environmental legal principles today and is embodied in a number of international legal instruments including the European Charter on the Environment and Health in 1989, the Single European Act in 1986, Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment in 2009 and the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes in 1999. Also, the principle now forms an integral part of the domestic legal systems of many countries around the world.

B. The Duty of the Polluter to Restore the Environment

The polluter pays principle in order to be meaningful shall impose the duty of bearing the total cost of pollution on the polluter. In a very narrow, anthropocentric sense, the total cost of pollution may mean compensating the people who have gotten affected by the pollution. However, it shall not be forgotten that the human beings are only a part of the wider earth community, and they are not and cannot be the sole victims of environmental pollution. Any sort of environmental pollution, even the most trivial form, affects the environment and all those who inhabit it one way or the other. Therefore, the true application of the polluter pays principle shall impose two-fold duties on the polluter. First, to compensate the people who were victimised by the pollution and second, to restore the environment back into its previous condition. Logically, the second component is more complex and expensive.

The duty of the polluter to restore the environment is being increasingly recognized in the international arena. In the *Costa Rica v Nicaragua* case decided in 2018, the International Court of Justice held that the environmental damage shall be valued from the perspective of the ecosystem as a whole. The Court in assessing the compensation, assigned value for the restoration of the damaged environment as well as to the impairment or loss of environmental goods and services prior to recovery.

The strongest recognition of the duty of the polluter to restore the environment, arguably, can be seen in India. In *Vellore Citizens' Welfare Forum v Union of India* [1996], the court held that,

> Polluter pays principle .... extends not only to compensate the victims of the pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of 'Sustainable Development' and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

This approach was accepted and followed in *Indian Council for Enviro-legal Action v Union of India (Sludge Case)* [1996], *MC Mehta v Kamal Nath* [1997] and several other cases. Therefore, it is not incorrect to say that India has conclusively accepted that the polluter pays principle necessarily entails the duty of the polluter to restore the environment back to the previous condition.

C. Recognition of Environmental Restoration by the Polluter in Sri Lanka

Polluter pays principle was first recognized in Sri Lanka in the landmark judicial decision, *Tikiri Banda Bulankulama v Secretary, Ministry of Industrial Development and others* [2000]. In the case, the

Supreme Court placed its attention on the argument of the petitioners that the protection afforded in the proposed agreement with regard to the repair of environmental damage is inadequate and held that these provisions are based on the outdated, archaic thought of nominally recognizing the environment and not placing a value on it. Honourable Amerasinghe J. referring to principle 16 of the Rio Declaration further held that,

> [t]he costs of environmental damage should, in my view, be borne by the party that causes such harm, rather than being allowed to fall on the general community to be paid through reduced environmental quality or increased taxation in order to mitigate the environmentally degrading effects of a project.

Thus, though not laid down in express and explicit terms, the honourable J. signalled the necessity of recognizing the environmental restoration duty of the polluter.

It was thereafter recognized in the *Ravindra Gunawardena Kariyawasam v Central Environmental Authority* where the court directed the respondent company to pay compensation in a sum of Rs.20 million to offset at least a part of the substantial loss, harm and damage caused to the residents of the Chunnakam area by the pollution of groundwater and soil due to the operation of the thermal power station by the respondent. Why did not the Supreme Court impose the entire cost of pollution on the respondent is open for debate, perhaps it might be due to the reason that the respondent company was found not to be the sole perpetrator of the water and soil pollution in the area. Moreover, whether the court has been entirely successful in imposing the liability of environmental restoration on the polluter is questionable given that the focus of the court was on cleaning the contaminated wells, rather than on bringing the groundwater in the area into its previous condition in general.

The strongest recognition of the duty of the polluter for environmental restoration can be seen in the recent *Wilpattu* case. In the case, the court of Appeal in Sri Lanka dealing with an alleged illegal settlement of internally displaced persons in the forest complex adjoining Wilpattu National Park, issued a writ of mandamus ordering the Conservator General of the Department of Forest Conservation to implement a tree planting programme in any area equivalent to the reserve forest area used for re-settlement of internally displaced persons. The court further issued an ancillary or consequential order directing the then Minister of Industry and Commerce to bear the full cost of the above tree planting programme who was recognized to be instrumental in using the forest land for non-forest purposes. The court ordered the Conservator General of the Department of Forest Conservation to calculate the costs of the tree planting programme, inform the former minister of this cost and the details of the account to which the said sum should be paid within two months. The court, in holding that, referred to and relied on a number of Indian judicial decisions which states that the polluter pays principle shall be interpreted as including the absolute liability to restore the environment.

This recognition is by far the widest recognition of the duty of the polluter to restore the environment in Sri Lanka. The decision is debatable on the ground that whether a tree planting programme in any area equivalent to the deforested forest area can be taken as a true restoration of the invaluable forest resource; trees, animals, insects, birds and soil which was lost. Yet, the decision of honourable De Silva J. shall be considered a significant landmark in the environmental jurisprudence in the country for its recognition of the duty of the polluter to restore the environment in clear and cogent terms.

D. The Use of the Polluter Pays Principle for MV X-Press Pearl Disaster

According to the above discussion, the polluter pays principle has been recognized as a part of the domestic environmental legal regime in Sri Lanka including the duty of the polluter to restore the environment. Restoration of the marine environment following the X-Press Pearl disaster is vital for the human community as well as the biotic community and shall be done at the highest phase possible. A fundamental rights petition has already been filed in the apex court of Sri Lanka by the Centre for Environmental Justice (Guarantee) Limited and several other petitioners against the Marine Environmental Protection Authority and several other respondents and it can be positively expected that the polluter pays principle will be strongly recognized in the case reaffirming the duty of the polluter to restore the marine environment in clear and cogent terms.

IV. CONCLUSION

The MV X-Press Pearl disaster has been one of the greatest environmental tragedies in the recorded

history of Sri Lanka. While the line of incidents which ultimately resulted in this environmental disaster cannot now be reversed, certain damages caused to the environment as a result of it can still be and shall be reversed. In Sri Lanka, the polluter's duty to restore the environment is recognized through judicial precedents. It would therefore, not be unreasonable to expect the judiciary in Sri Lanka to once again play its crucial role in the fight for environmental protection in the country by the imposition of the duty on the polluter (the ship owner and the local agent of the shipping company) for the unprecedented and far-reaching damage caused to the marine environment due to their actions or inactions and for the restoration of the environment back to its previous condition.

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AUTHOR BIOGRAPHIES

NKK Mudalige and AA Edirisinghe are Senior Lecturers at the Faculty of Law, General Sir John Kotelawala Defence University who passionately believe that the environment belongs to all the living beings.

Striking a Balance between COVID-19 Regulatory Responses and the Fundamental Rights of Citizens in Sri Lanka within the New Normal

TD Walgama

Faculty of Law, General Sir John Kotelawela Defence University, Ratmalana, Sri Lanka

twalgama@gmail.com

Abstract - With the World Health Organization (WHO) declaring the Covid-19 outbreak a global pandemic, states have been compelled to take prompt actions to limit the spread of the virus. In response to the crisis and adhering to the global health standards, the Sri Lankan government has imposed a series of restrictions. The legal basis upon which these restrictions have been imposed is constantly debated and are viewed as unlawful restrictions upon the fundamental rights of citizens secured by virtue of the Constitution. Counter arguments support that these restrictions are imposed as prescribed by law in the interests of national security, public order, and public health. In such a background this paper will attempt to recognize the possible breaches of fundamental rights caused by the restrictions imposed while analysing the impact of such restrictions on the fundamental rights of citizens. In order to study the main research problem library research was carried out with the aid of relevant statutes and international instruments. The analysis of the present legal framework relating to the imposition of quarantine restrictions supports the view that the rule of law must be a fundamental principle in every government action whereby the states should collectively collaborate to curb the virus while respecting the basic norm of sovereignty of the people. It is understood that the imposition of quarantine restrictions is essential in present times, but they should be imposed in a manner that does not interfere with the fundamental rights of people while protecting the dignity of a democratic society.

Keywords— global crisis, fundamental rights, rule of law, collective action

I. INTRODUCTION

Ever since the first cases of Covid-19 being reported in Wuhan China in the latter part of 2019, the virus has been spreading in a global scale up to date, in all countries irrespective of any difference. The first case of the virus in Sri Lankan reported in January 2020, a Chinese national was successfully met by the medical authorities of the country and the approach taken by Sri Lanka to curb the virus at early stages was applauded by the international community. However with the outbreak of the second and third waves the ability to limit the spread of the virus has deteriorated and Sri Lanka is presently experiencing the dire consequences of delayed precautions with over thousand new cases being reported each day.

In such a background the responsible authorities have taken actions to impose island wide travel restrictions and restrictions on public gatherings, non-essential work, conducting schools and work of other governmental institutions. Within the purview of state responsibility, they are seen as essential and mandatory to safeguard the lives of the people. Though these actions have been taken in furtherance of the provisions of Quarantine and Diseases Prevention Ordinance of Sri Lanka No 03 of 1987 the legality of the limitations has been questioned by the Human Rights Authorities in the country. The arguments basically surround the fact that these restrictions have created a hindrance for the citizens to enjoy their fundamental rights such as equality, movement and freedom from degrading treatment.

Thereby this research has attempted to address the main research problem by recognizing how the imposition of these restrictions violates the fundamental rights of the citizens. The main objective of the research is to identify the fundamental rights that have been violated and devise mechanisms through which the government will be able to bring about effective solutions to curb the virus while safeguarding the rights of a citizen in a democratic state. Recommendations will be made as to how the government can bring about a balance between the restrictions imposed and the fundamental rights of the people.

II. METHODOLOGY

To achieve the aforesaid research objectives a library research has been carried out. In the adoption of the black letter approach primary sources including the Constitution of Sri Lanka, Quarantine and Diseases Prevention Act No 12 of 1952, The Public Security Ordinance No 06 of 1978, Disaster Management Act No 13 of 2005 and other relevant statutes have been utilized. Secondary data have been collected through scholarly articles, working papers, reports of United Nations (UN) on covid-19 outbreak, reports of Human Rights Commission on Sri Lanka (HRCSL) on protection of human rights during the pandemic. Through the analysis of such resources the manners through which fundamental rights can be protected thus establishing rule of law has been understood.

III. IMPORTANCE OF FUNDAMENTAL RIGHTS AMIDST THE GLOBAL PANDEMIC

With the unprecedented times bought about in the global scenario states have taken extraordinary measures to protect the lives of the citizens. When the Sri Lankan context is concerned the government has acted in a proactive manner with stringent controls on travel and public gathering. Though a state of emergency has not been declared island wide curfew has been imposed while promoting practises such as working from home for non-essential services.

A multi stakeholder approach in fighting the pandemic with the inclusion of the services of the armed forces and medical officials has been implemented along with the rapid establishment of quarantine and treatment centres. Powers have been decentralized and vested upon local authorities to take necessary action at regional levels (Amarathunga et al, 2020). However with the imposition of more stringent barriers human rights issues have been surfaced while emphasizing the legality of the imposition of restrictions.

UN human rights reports highlight that human rights of all citizens should be protected ensuring that everyone participates equally in response to crisis and are provided equal opportunities of access to healthcare services and other basic requirements. It is argued that the outbreak of the virus has provided grounds for the government to supress contradictory opinions while making the government less accountable for the decisions and policy measures on the view that they are taken purely to contain the virus thus leading to autocratic behaviours (Kugathsan, 2020). It should be noted that these unprecedented times does not provide the governments with sole authority to impose restrictions on the grounds of public health in an arbitrary manner. Governments are expected to act in respect of democracy without adhering to autocratic decisions and actions (HRCSL, 2020).

It is in this background the importance of protection of fundamental rights as an enforcement mechanism comes into play. In furtherance of human rights at a national level, fundamental rights guaranteed by the constitution should be protected upon respect to rule of law. Challenges are imposed on right to movement, equality, freedom from torture and degrading treatment and many other rights attached therewith. Challenges on securing fundamental rights have become a crucial issue amidst the pandemic as those rights have been curtailed with the imposition of restrictions.

It is the duty of the states to ensure that they do not violate the fundamental rights of people on the grounds of protecting their lives through autocratic measures. On the other hand the citizens should possess a coherent understanding of their inherent rights without vesting the sole authority on the governments to impose any measure necessary to curb the virus at the expense of fundamental rights. It is argued that the restrictions thus imposed should be provided by law to achieve a legitimate aim in a democratic society (Kugathasan, 2020).

IV. LIMITATIONS ON THE FREEDOM OF MOVEMENT

Freedom of movement is secured by article 14 (1) (h) of the constitution of The Democratic Socialist Republic of Sri Lanka. The island wide travel restrictions are basically imposed with the intention of limiting the movement of citizens viewed as the main manner through which the virus is transmitted. Limiting citizens to the vicinity of their homes and avoiding movement is seen as essential within the pandemic. As by article 15(6) of the constitution restrictions can be imposed on the freedom of movement as prescribed by law. Restrictions on the right of movement should be necessary and proportionate to achieve the legitimate aim with which they are imposed and should not be discriminatory (UN, 2020). Imposition of curfew and lockdowns should be to the extent necessary and in accordance with the regulations relevant to such instances.

The manner in which actions should be taken against those who breach those restrictions should be regulated. The arrests of such people and detention

should be carried out according to the relevant statutes and procedures in a manner that would not violate the rights of the citizens. Policy making, arrest and detention of those who violate the travel restrictions amidst the covid-19 pandemic should not be a mechanism through which the government barricades the voice of human rights institutions and other interest groups making it essential to comply with any arbitrary action taken by state officials. Further the restrictions should be imposed on every citizen in an equal manner without allowing a privileged minority to enjoy unrestricted rights with a view to establish rule of law in the country.

Attached with the freedom to movement is a series of other rights that are questioned along with. Lockdowns have restricted employees from attending to work causing organizations to implement redundancy plans leading to issues such as unemployment, access to basic needs and health services (Wimalaweera, 2020). Burdened with the outbreak of the virus and loss of employment many citizens are put in further helplessness resulting in higher levels of poverty, dependency and inequality. Thus the government is vested with a wider responsibility to provide for the social and economic rights of the citizens to ensure the quality of life while guaranteeing that the travel restrictions do not hinder many other fundamental rights of the citizens.

While the imposition of restrictions on movements should be necessary, proportionate and equal, actions for violations of such restrictions should be flexible and humane without imposing unnecessary fear in the citizens. The imposition of the restrictions should not be in a manner that the citizens completely vest their inherent rights on the state as a trade-off for their freedom to take whatever action necessary façaded by the need of curbing the virus and protecting the valuable lives of the citizens during a global pandemic which has bought dire consequences to the world as a whole.

V. BREACHES ON EQUALITY

Equality is essentially the most important fundamental right protected by the constitution. Provided in article 12(1) of the constitution equality within the pandemic requires all citizens to be included in the process of combatting the virus through equal access to healthcare services without any discrimination. Treatments and quarantine facilities should be provided to the infected, exposed, young, women and older generations in equal sense without any distinction. Provision of vaccinations should be done in an equal manner without the facility being secured only to populations with access to internal connections with those in authority. UN reports suggests that discriminations across the world are observed in respect to health care workers, older populations, persons with disabilities, Internally displaced people (IDP), prisoners and migrants (UN,2020). There should be equal access to information by all citizens guaranteeing that all citizens are well informed about quarantine regulations, preventive measures and remedies to curb the virus.

Inequalities in income distribution and the distribution of resources are observed. With the imposition of restrictions daily income earners have failed to find a living thus putting their daily living at a risk. Though the government has initiated a program to distribute a subsidiary of five thousand rupees to daily wage earners the efficacy and equality with which these programs are initiated have become doubtful. The situation is further worsened with the flood conditions faced by citizens of several parts of the island where they have been displaced and left homeless. Within the facilities provided for the displaced social distancing has become more challenging while citizens are further opened to the disease.

The closure of schools has led the adoption of distance learning and online teaching requiring students to adopt technological tools to facilitate learning. Many issues have arisen in less developed and rural areas in respect to facilities such as internet connections and the availability of the needed devices. This has created a barrier for students to be deprived of avenues for educations thus creating inequalities (Attanayake, 2020). Equality should be promoted in the cremation of those who have died resulting from Covid-19 infection and special facilities should not be provided to a privileged few. Regulations on cremation should be such that the practises are the same nationwide without any distinction of social status.

It is seen that the breaches of equality are vast and are surfaced in a multiplicity of circumstances. Though the entire responsibility of provision of all facilities cannot be vested on the government entirely the role of the government in furthering equality in the services provided must be ensured. The efforts of the Sri Lankan government to provide facilities for covid-19 treatments to all citizens without a distinction should be appreciated.

Similarly the state should not create a marginalization of services and provide essential subsidiaries to populations that genuinely require the assistance of the government to secure their daily livelihood during these unprecedented times.

VI. FREEDOM FROM TORTURE AND DEGRADING TREATMENT

Article 11 of the constitution guarantees that no person should be subjected to torture, cruel, inhumane or degrading treatment or punishment. With the imposition of the restrictions the police have been vested with the power to take action against those who violate the travel restrictions thus imposed. Though such power is vested the manner in which a person is arrested should be humane and must not be disproportionate with utmost respect upon the dignity of such person as a human being and in accordance with the law of the country. In counter arguments it is the duty of a responsible citizen to adhere to travel restrictions and take collection action alongside the government to contain the virus.

As reached at by the prominent legal scholars and judicial precedents in Sri Lanka embedded within the right to be free from torture is the right to life which must be secured in every state action. Thereby it should be established that every infected person and those under quarantine inherently enjoy a right to medical treatment and the right to work towards safeguarding their lives. The right of every citizen to live should be safeguarded by the medical practitioners, government and other responsible authorities (Janz, 2020). Thus the need of a collective action to combat the virus both through precautionary and remedial measures with effective of all stakeholders is called for.

Detaching from a fundamental rights perspective looking upon the freedom from torture and ill treatment in a human rights perspective, domestic violence can be viewed as a major issue during the period of lockdown imposition. Many cases have been reported where women and children have been subject to various abuses at their homes resulting in severe consequences. Though not caused through an administrative or executive action domestic violence has become a major human rights issue that needs quick responses within the pandemic times. Statistics show that there is more than 12% increase in the acts of physical abuse and sexual violence against women and in most instances the perpetrators has been their own husbands or intimate partners (Epidemiology Unit, 2020).

It has been researched that the main reasons that has led to such issues is the mental pressure undergone due to the pandemic and lockdowns coupled with unemployment issues and increase in time spent with the abusers. Though the actions that could be taken at state level for domestic issues are limited it is felt that initial actions should be taken to protect the human rights of women and children who are subject to violence during the pandemic. Actions should be taken in accordance with the Domestic Violence Act no 04 of 2015 which imposes a legal obligation on the state to prevent actions of domestic violence. Additionally during the unprecedented times a responsibility is vested with the responsible authorities to bring about practical and effective solutions through a social support system without directing the victims to return to their abusers who have been strictly advised.

VII. SECURING FUNDAMENTAL RIGHTS THROUGH THE RULE OF LAW

Rule of Law is a major constitutional principle that should be respected upon by all in equal sense. While the principle demand utmost adherence upon it the extent to which a state aims to establish rule of law will decide the wellbeing of all citizens. The outlining base of the principle is that every person is equal before the law and should be subject to the due process of the law. Thereby rule of law embeds supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, procedural and legal transparency respect upon the rights of citizens, peace and democracy (UNSC,2004). Strict adherence to the rule of law will ensure that the government does not engage in arbitrary policy making that will cause an impact on the fundamental rights of citizens. Further rule of law will ensure that the regulatory responses are transparent, flexible, proportionate and are imposed as by the law.

As stated the imposed restrictions are essential to curb the virus and decrease the number of infected populations and it is the duty of the citizens to adhere to these regulations following the government imposed responses. However the restrictions should not be driven politically creating a barrier in democratic conduct by imposing barriers of expression of the disfavours of interest groups (UN, 2020). Fairness, due process of law, equality and non-discrimination should be followed in the provisions

of healthcare services and other relief methods. A less discussed issue is the evasion of privacy created as a result of the pandemic with the use of new technologies such as drones, artificial intelligence. Though the right is not specifically guaranteed in the country through the establishment of right to live by virtue of article 11 it can be argued that during the pandemic the privacy of the citizens should be protected.

The government should at all time work towards building peace and security within the nation by uplifting the rule of law. Quarantine regulations and travel restrictions should be imposed according to the relevant statues, international law and should not be extensive and disproportionate. Such restrictions may impose a barrier on the achievement of certain fundamental rights. But restrictions on fundamental rights can be imposed according to the constitution as prescribed by the law in accordance with concerns on public security, public economy and health.

Covid-19 pandemic has proven sufficient to impose such restrictions yet they should not be extensive and arbitrary. Imposition of restrictions as permitted by the law will strike an effective relationship between the fundamental rights government policy making (Amarathunga et al, 2020) Therefore it is seen that rule of law is a prominent principle that would serve beneficial during the unprecedented times to safeguard the rights of the citizens and limit the arbitrary actions of the government that would have a long term negative impact on the respect of dignity to human life in a democratic country.

VIII. THE NEED OF COLLECTIVE ACTION

International sources state that Covid -19 is not a battle to be fought alone. It is the collective action of the government, citizens and the global population as a whole that will lead the world to successfully battle the pandemic. In the context of Sri Lanka the prompt actions of the government should be appreciated along with the efforts of all stakeholders to combat the virus. Medical health professionals, armed forces, the government and all respective authorities have contributed immensely to safeguard the rights of the citizens (Mukhopadhyay, 2020)

However the entire burden of battling the pandemic should not be solely vested on the government. Owing to the economic and financial stability of the country provisions of all medical treatments free of charge has itself become a great pressure on the economy of the country.

On the other hand the citizens should effectively adhere to the travel restrictions and other regulations with a view to assist the government and save their own lives. However they should be vigilant and well aware of their rights in order to avoid the abuse and trade off of the fundamental rights. The citizens should be aware that the outbreak of the pandemic though provides grounds for restrictions upon fundamental rights does not call for arbitrary, in equal and undemocratic actions.

In the same manner the government should ensure that they donot impose regusltions ore tthan neccsaary or extensive undermining the guding pricniples of democratic institutions. Emergency powers should not be imposed to bring about more tragedy to the general public through inequitable regulations, arrests and detention. The policymaking should be humane to understand the plight of the citizens and provide for their welfare. Thus it is seen that respect upon rule of law becomes the basis for fighting the pandemic in a democratic manner as an accountable government and responsible citizens.

Going beyond the national perspective UN highlights that the global pandemic calls for a collective global actions where each state should build capabilities to effectively fight the circumstances. Considering the economic levels of states and the medical expenses incurred UN has directed developed countries to extend their assistance to countries that are in need of medical equipment, vaccinations and other medical facilities.

Therefore in order to gain the collective contribution of all stakeholders authoritative institutions should take transparent decisions, promote open communication with accurate information, open themselves to criticism thereby promoting an integrated, inclusive approach to fight the pandemic hence establishing democracy and rule of law.

IX. CONCLUSION

The outbreak of the Covid – 19 pandemic has demanded states to implement strict regulations on the general public in order to prevent the spread of virus into uncontrollable levels. In response to such demands Sri Lankan government too has implemented various regulatory responses to limit the movement and gathering of people. These restrictions are essential to protect and safeguard the rights of people. However in a legal perspective travel restrictions are viewed as limitations upon the fundamental rights of the public. Hence in the imposition of such regulations the government

should be vigilant about the possible breaches of fundamental rights that could be caused as a result.

In this paper the possible violations of freedom of movement, right to equality and the freedom from torture and inhumane treatment has been discussed alongside human rights perspectives. While it is seen that the government should not act in a manner arbitrary and inhumane in policy making during the pandemic the citizens are also vested with the duty to ensure that they adhere to the regulations imposed.

Establishment of rule of law is seen as the most effective remedy to protect the rights of the people amidst the regulatory responses of the government. In such a background the government regulations should be implemented only to the extent necessary and the violations of these regulations should be penalized in a legal and equitable manner. It is noted that the unprecedented times does not bring about power to the government to act in an arbitrary manner in derogation of democracy and rule of law. The extent to which Sri Lanka is able to establish rule of law will determine the extent to which the rights of the citizens and the actions of regulatory bodies are balanced.

However in a global scale it is noted that overcoming the pandemic demands collective action of all stakeholders who will jointly work towards a common goal. While the efforts of the government to fight the pandemic is to be appreciated given the economic and financial circumstances of Sri Lanka the government the sole responsibility of fighting the pandemic cannot be vested on the government itself. Hence it becomes the responsibility of all stakeholders including the citizens to ensure that they fulfil their contribution to support the government in their actions while seeking a balance between the imposed regulations and fundamental rights. It is only through the effective establishment of rule of law and due legal process that the Sri Lankan legal system will be able to address the pandemic in a coherent manner upon respect to the rights inherently enjoyed by the people and long standing principles of a democratic nation.

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ABBREVIATIONS

HRCSL – Human Rights Commission of Sri Lanka

IDP – Internally Displaced People

UN – United Nations

UNSC – United Nations Security Council

WHO- World Health Organization

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AUTHOR BIOGRAPHY

Thamasha Walgama has completed her LLB at the General Sir John Kothelawela Defence University. She takes a keen interest in the areas of Constitutional Law, International Law and Administrative Law. This research deals with the legality of the imposition of the Covid-19 regulatory responses and the need of strict adherence to Rule of Law to ensure the protection of the rights of the citizens.

Apps: Driven Uncertainty of Welfare of Gig Workers

DAM Supunika# and VP Liyanage

Sri Lanka Law College

#madushanisupunika@gmail.com

Abstract - Most of the people have had to reluctantly engage in the gig economy through apps upended because of either the unemployment or layoff from their full-time jobs in the new normal. On the other hand, Covid-19 has impacted the gig workers' lives either by loss of gigs or the need to work in unsafe work conditions with low income. This research identified whether the welfare of gig workers can be protected under the domestic labour legislations in Sri Lanka. The aim of this study is to discuss whether the app based gig workers can be classified either under contract of service or contract for service to examine the legal position of app based gig workers under the UK, U.S.A. and Canadian jurisdictions in comparison to Sri Lanka and to propose suitable recommendations to uphold the welfare of the app based gig workers. The methodology of this research is a combination of black letter methodology and comparative research methodology with Sri Lanka, U.K., U.S.A and Canada. These different jurisdictions were analysed to provide a descriptive legal analysis related to the said area. Furthermore, this research employs a qualitative analysis of primary data such as constitutional provisions, labour legislations and judicial decisions and secondary data such as books and web articles. The study indicates the importance of recognizing the employment status of gig workers as employees with necessary amendments to the existing domestic legal framework to effectively address the issues of their welfare. Finally, the study concludes by providing effective recommendations to address the said issue while upholding the relevant human rights and the fundamental rights such as right to equality, freedom to engage in any lawful occupation while also upholding the principles of Natural Justice.

Keywords— welfare of app based gig worker, status of employment, labour rights

I. INTRODUCTION

The emergence of the global pandemic affects loss of present and future employment opportunities due to the immediate aftermath of curfew-levels and lockdowns. Yet at the same time, it has created a demand for some opportunities through the gig economy. Gig economy can be defined as a free market system where organizations (clients) and independent service providers/ workers engage in short term work arrangements (Duszynski, 2020) instead of full-time employment with low income stability and job security. Delivery, retail, modality, IT, education, data processing are some of the industries where the gig economy model is practiced. However, in some instances it is hard to classify gig workers as independent contractors, because sometimes they are defined as either casual employees or temporary employees. According to the opinion of Scholars, the confusion with regard to the classification of gig workers is not new. (Jennifer Pinsof, 2016)

With the years of technological revolution, digital platforms such as apps and websites are the connector of the clients and the gig workers. Since the outbreak of the pandemic, the app based gigs have become more significant in the new normal than before due to the increased reliance on gig workers to deliver the daily essentials to consumers who live in areas where travel restrictions are imposed to minimize crowded gatherings. Furthermore, Rebecca Henderson (2020) emphasized that the crisis has upended the traditional 9-5 working world and caused many blue- and white-collar employees to pursue gig work for additional – or even primary – income during these unprecedented times (Forbes, 2020).

Even though it offers various demanding opportunities in the prevailing situation, at the same time it also poses threats to a decent working environment, income stability, social security and fair working conditions. For instance; failure to pay minimum wage, lack of breaks for meal and rest, illegal deductions from pay and routine violations of

law designed to protect workers' health and safety. Such exploitative conditions raise app based works that evolve through lack of control, transparency and stability for gig workers, even app based gig companies have considered them as their independent contractors, not the employees of their companies.

On the other hand, app based gig workers have no safeguard from labour legislations because of their uncertain employment status, even though both gig workers and traditional employees perform the same task in the same strength. Therefore, they are subjected to unequal treatment for equal work.

Since the issues of app based gig workers are common to all jurisdictions in the world, it is necessary to analyse the legal strategies adopted by other jurisdictions and how can it be adopted to the Sri Lankan context within a just and equitable framework to uphold the social justice theory and welfare of the gig workers.

II. METHODOLOGY AND EXPERIMENTAL DESIGN

A combination of Black Letter Methodology and comparative research methodology using geographically different Uber case decisions have been analysed in this research to distinguish the different concepts in law. Furthermore, the research would employ a qualitative analysis of primary data such as constitutional provisions, statutory provisions and judicial decisions whereas secondary data of journal articles, books, research papers and online sources. The limitations of this research would be selection of only three foreign jurisdictions and solely based on the black letter approach and absence of judicial decisions as well as lack of references in this regard.

III. RESULTS AND DISCUSSION

A. Contract of Employment vs. Contract for Employment.

The nature of employment can be classified as contract for service and contract of service. The contracts created between employer and employee are known as the contract of employment. These contracts consist of a *sui-generis* nature which promotes the ideas of the theory of social justice through domestic labour legislations, because it is needed to balance the unequal bargaining power between employer and employee relationship in the contract to create a safe working environment without being subjected to exploitation.

Contract for service refers to an independent contractor who is contracted to perform a service to another business as a non-employee and has direction over the work to be done where the employer does not have the control as to how it should be done. Unlike the employees, they are not subjected to labour legislation. If any dispute arises between an independent contractor and client, they have to go through a litigation process as in an instance where a breach of contract occurred.

In the modern labour market, the app based gig workers are considered to be independent contractors, but no relationship exists between the clients and the workers: they execute the task and is paid by the platform, which then provides the result to the client or the platform acts more as a facilitator of the relationship between clients and workers (Risak and Warter, 2015). In other words, apps unilaterally control the workers' choice to work, payment rates through its algorithm as well as the terms and conditions between clients and the gig workers have been executed by the app based gig companies according to their wills. Such control of the working autonomy by the app as well as the lack of transparency between client and the gig worker are creating confusion about the status of employment as to whether they are considered as independent contractors, even though they are subjected to the control and non-negotiable terms and conditions of the gig companies.

During this ongoing pandemic, app-based gig workers are affected differently based on the service they provide for their clients. Therefore, expansion of earning opportunities generated through apps have not been uniformed. For example, because of the curfew and lockdown situations, the demand for daily essentials delivery to the doorstep increased whereas it affects decreased gig work for taxi drivers. However, regulatory protection from labour legislation for employees are not applied for the app based gig workers because of the consideration of the employment status as the independent contractor or the self-employer. Therefore, they are unable to access the minimum wage, health and safety and decent working hours, job security as normal employees who are protected from labour legislations in the event of lay off or unemployment or during unsafe situations in the employment similar to the new normal.

Therefore, it has led to exploitation of the rights of gig workers as human beings which are specifically recognized under Article 23 of UDHR and Article 7 ICESCR. These rights include the right to free choice of employment, protection against unemployment, enjoyment of just and favourable conditions of work such as minimum remuneration, fair wages and equal remuneration of work of equal value, safe and healthy working conditions, rest, leisure, working hours and holidays.

In addition, International Labour Organization (ILO) recognizes fundamental principles and rights at work such as elimination of forced labour, abolition of child labour, elimination of discrimination in respect of employment and occupation as universal labour principles to ensure decent work, equity, social progress to achieve both welfare of worker and the economic growth at the same time.

B. Domestic Legal Framework

As a welfare State, the Sri Lankan Constitution has recognized the obligation of the State to ensure the social security and welfare of the people by securing and protecting the social order under Article 27. And it also enacted legislations at the domestic level incorporating international standards with regard to Labour laws. Therefore, the State intervenes in the contract of employment as an invisible third party to protect the interest of employees from unlawful exploitation because of their unequal bargaining power compared to the dominant employers and for the reason that dispute between employer-employee relationship will affect the development, economy, stability as well as the future generation of the country.

Moreover, most of the domestic labour legislations itself define the term "workman" to determine whether a specific individual is an employee or not by minimizing ambiguities. For instance; Section 48 of the Industrial Dispute Act define "workman" as an individual who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing and whether it is a contract of service or of apprenticeship or a contract personally to execute any work or labour and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and includes any person whose services have been terminated. Likewise, other legislations which include the definition of workman defines it in the same scope as aforesaid. However, such legislations cover only contracts of employment within the meaning of traditional employer-employee relationships. It does not cover the app based gig workers who are under the virtual control of the app based gig companies.

However, Article 14(g) of the Sri Lankan Constitution grants every citizen the right to engage in lawful occupation and thus the same right should be applied to gig workers and under Article 12, the gig workers should also be treated equally on the basis that equal remuneration should be paid for equal work irrespective of the mode of the platform: specifically this means that gig workers should be treated equally, even though they are outsourced through crowd work or location-based application (apps).

C. Contract Relationship between Apps and Gig Workers

1) Position of the United Kingdom: Section 230(3) of The Employment Relations Act, section 54 of the National Minimum Wage Act and regulation 2(1) the Working Time Regulations contain similar definitions with regard to the "worker" and it is defined as such an individual has required to enter into or works under implied or express contract by way of either in written or oral to perform any work or service for another party to the contract whose is not classified as client or customer of any profession or business. The virtue of such interpretation grants statutory protections to the employees by means of protecting the universal labour rights such as minimum wage, a set working hour as well as health and safety. However, the workers under the app based gig economy model are not covered under the said definition.

Nevertheless, judicial activism upheld the need for just and equitable decisions for the expansion of application of labour legislation for app based gig workers. The case of *Uber BV and others (Appellants) v Aslam and others (Respondents)* is a *locus classicus* as a recent landmark case in the U.K. where the rights of workers were awarded the same status as rights of employers. In this case the main issue that was raised was whether the drivers of private hire vehicles who provide services through the UberApp can be considered as employees. Here, the Supreme Court confirmed that the reality of the relationship of parties to the agreement must be determined by examining all circumstances by not relying only upon the written documentation as held in the case of *Autoclenz Ltd v. Belcher*.

Further, the court had applied the "integration test" and the "economic reality test". The integration test has been applied in instances where the business renders a service and earns profits and drivers provide their skilled labour. In addition, the court applied the economic reality test and highlighted that the Uber Company provides opportunities for small scale businesses and that many Uber drivers employ in individual capacity. But they are unable to enhance their businesses because they do not have the opportunity to directly negotiate with customers and decide the price rates. However, at the end, court analysed the facts and circumstances of the case by applying the control test and decided that Uber drivers should be considered not as self-employed but as workers who should be entitled to a minimum wage, paid holidays etc. based on following five yardsticks:

1. Uber sets the terms and conditions of its service.
2. Uber has significant control over the manner in which Uber drivers should work since they have a rating system. If the Uber driver fails to complete the daily targets they have to either pay a penalty or terminate the contract.
3. Uber has taken steps to ensure that drivers and passengers do not enter into agreements outside the UberApp.
4. Uber sets the fares for each ride, not allowing the drivers to set their own prices.
5. Drivers face penalties for cancelling and not accepting the rides.

2) Position of The USA - California: In the USA, the "ABC test" is the most commonly used test to ascertain the status of employee and independent contractor. This is a threefold test where a worker is only considered to be an independent contractor, if they satisfy all the three fold of the test and the burden of proof lies on the employers. The three folds include,

1. Individuals are free from control and direction of the employer relating to the performance of the service, both under the contract and in fact.
2. Service is performed outside the usual course of the business of the employer.
3. Individuals are customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

Therefore, a worker will be classified as an employee for the purpose of wage and hour protection, if the employer fails to establish the aforesaid three limbs.

In the case of *Dynamex Operations West, Inc. v Superior* Court clarified that "ABC test" should be used to determine whether a worker is an employee or independent contractor, where it was held that the drivers were misclassified as independent workers. Court further emphasized that in order to determine the division between employees and independent contractors the 'suffer or permit to work' under the wage orders of California is in need of a hiring entity to contend with the position of independent contractor to establish the ABC test. This portrays that there is an increasement of the app based gig work at present. Thus, in order to be classified as an independent contractor, workers' labour should be free from the company's control, outside the span of its business and should be a common part of workers business. If not, the worker should be classified as an employee.

As a further step, the State of California codified the "ABC test" through the Bill of the California Assembly Bill 5 (AB 5) which is generally known as gig workers' law. It creates a certain extent of clear classification for app based gig workers as employees instead of independent contractors to halt against deprivation of basic labour rights by the app based gig companies. For example; it makes it harder to misclassify home health janitors, truck drivers, construction workers, home health aides, and hotel and hospitality workers etc as independent contractors. Specifically, this AB 5 helps to ensure the purposes of federal government wage and hour protection, but it does not ensure the right to join the unions as well as certain categories of jobs are not covered by it.

Despite the AB 5, policy of Proposition 22 which was passed by the voters of California according to the Section 8 of Article II of the California Constitution for a purpose of carrying out the status of independent contractor for the app based drivers. Nevertheless, if such gig companies apply this model, they have to guarantee certain benefits and develop policies against workplace discrimination and sexual-harassment for their app drivers.

3) Position of Canada: In the case of *Uber Technologies Inc. v. Heller*, the claimant, brought a class action and argued that under the Ontario's Employment

Standards Act 2000, they are entitled to a minimum wage with vacation pay and overtime because of the mandatory Arbitration Clause included in their contract which states that mediation and arbitration should be conducted according to the law of the Netherland. Accordingly, they do not have a chance to challenge the said mandatory arbitration clause as an independent contractor. Based on this argument, the claimant further argued that mandatory arbitration clause is unconscionable based on the unequal bargaining power between Uber drivers and Uber Company.

Here, the Court adopted the "two-part test" to determine whether an agreement is 'unconscionable' and it consist as follows;

1. inequality of bargaining power; and
2. an improvident bargain.

Moreover, the majority was of the view that there was a clear inequality of bargaining power between Uber and Uber drivers, because they have to either accept or reject the contract for service of Uber without negotiating any terms of it and there was no reference regarding the costs of mediation and arbitration in the Netherlands. Finally, the Court concluded the case on the basis that the arbitration agreement was invalid and unconscionable.

IV. OBSERVATION AND RECOMMENDATIONS

When analysing the UK jurisdiction it can be observed that individuals within the meaning of the Employment Relations Act are offered employment rights when compared to independent contractors. However, in the case of *Uber BV and others (Appellants) v Aslam and others (Respondents)* court confirmed that it is necessary to scrutinize the substance of the relationship with using the "control test" rather than considering the mere label of independent contractor has been given to the app based gig workers.

With comparison to the UK approach, the California State categorizes the independent contractors in a broader sense without limiting the application of "test developed by the court" to distinguish the app based gig worker employment status, either employee or independent contractor based on the facts and circumstance of each case. In other words, they apply the codified laws, policy initiatives as well as "tests' ' to make the position of each worker crystal clear as much as possible to minimize the misclassification of the employment status. Normally, an individual who enters into or works under the contract for employment does not have protection against exploitative conditions from legislation. In Proposition 22, app based drivers have certain labour legislative protection along with anti-discrimianation and protection from sexual-harassment, even though it considers such workers as independent contractors, whereas AB 5 considers them as employees of the app based company and allow them to possess minimum wage and favourable working hours for well-being of the app based gig workers. In contrast, there are three categories of independent contractors which allow the court to determine the emerging status of employment namely persons covered under Proposition 22, workers covered under AB 5 and the remaining workers who qualify as independent contractors under the AB 5 and ABC test.

However, the Canadian Supreme Court had only considered the non-negotiable mandatory arbitration clause in their contract which deviated the status of independent contractor to employee and held that such contract is invalid, because of the unconscionable characteristic of the contract without examining the status of Employment. Whereby, the Canadian Court decided their Uber case against the confirmed fact in the decision of the U.K. Uber case which emphasized the fact that the reality of the relationship of parties to the agreement must be determined by examining all circumstances using the test developed by the court, not relying only upon the written documentation.

While there is no standard of practice to define the app based gig workers, the Sri Lankan legal system does not specifically identify app based gig workers and how to continue their classification in the regulatory framework too. Further, Sri Lanka has interpreted the term "workman" as similar to the UK jurisdiction. However, Sri Lanka has not applied the "control test" to determine the employment status of the gig workers and therefore, there are no authoritative judicial decisions to be applied to decide on the welfare of app based gig workers. Hence, there is a prompt need to identify recommendations to address this issue promptly and effectively in order to fill the existing gaps in the Sri Lankan law.

Since the end of the pandemic is unpredictable, the world has started to embrace new ways of working in the new normal. And as a result, app based platforms have created jobs for gig workers to cater to this situation. However, it is evident that

exploitation of rights of gig workers have become inevitable. Thus, effective recommendations should be introduced to secure the welfare and working conditions of the gig workers to uphold the fundamental right to equality enshrined in Article 12 of the Constitution. The proposed recommendations are as follows.

- A regulatory framework should be established in a manner where labour legislations cover independent contractors in order to facilitate welfare and working conditions of such workers. And it should be created in a manner which ensures the Fundamental right to lawful occupation.
- A clear, well defined and unambiguous definition for the term "independent contractor" should be incorporated into the existing labour legislations.
- It could be recommended that a separate ad hoc tribunal be established to ensure the right to fair hearing and to uphold the principles of Natural Justice. At present, aggrieved parties can only seek a remedy for a breach of contract from the District Court because independent contractors are not recognized under the labour legislations and hence are not entitled to get a just and equitable award from the Labour Tribunal because they are not protected under the labour legislations. In addition, it is better to establish a Mediation Board to review the contracts of app based gig workers since most of them are unskilled workforce.

V. CONCLUSION

The study reveals that in Sri Lanka, only the individuals who are subjected to the contract of employment are protected under the labour legislations. However, such legislations do not provide at least minimum protection to the app based gig workers even though they are subjected to the non-negotiable control of the app based gig companies. As a result of that, it has led to exploitation of human rights of the app based gig workers in this new normal. Therefore, there is a prompt need to recognize the rights of gig workers to at least provide them with minimum wage benefits and health and safety benefits.

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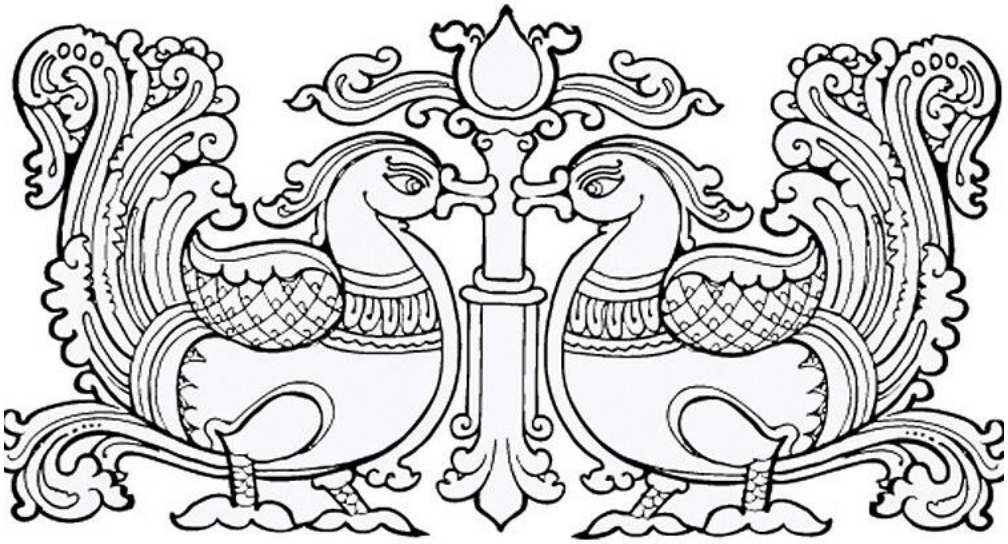
AUTHOR BIOGRAPHIES

Danagala Athukoralage Madushani Supunika is a LL.B. graduate of General Sir John Kotelawala Defence University. She is a Final Year student of the Sri Lanka Law College. Her research interests include Criminal Law and Intellectual Property Law.

Vishna Pulnadie Liyanage is a LL.B. graduate of General Sir John Kotelawala Defence University. She is a Final Year student of the Sri Lanka Law College. Her research interests include Environmental Law, Criminal Law and Constitutional Law.



Poster Session

The Need of Blockchain Law in a Cryptocurrency-Based Future: Potential and Possibility of a Purely Blockchain Entity

M Karunananthan# and FAM Imthiyaz

Faculty of Law, General Sir John Kotelawala Defence University, Sri Lanka

#mathroth1234@gmail.com

Abstract - Blockchain technology first surfaced before ten years ago and it has been the only gaining traction emerged for the last two to three years. Therefore, it is much needed to focus the attention of the governments to implement Blockchain Laws in the present highly digitalized environment. This paper aims to analyse the Blockchain Technology and examine the requirement of a particular legal regime, with its growing popularity among businesses and consumers, as it is a relatively new technology in terms of legislation. This study is largely based on a qualitative approach, a contemporary study on legislations of the countries which follow and do not follow blockchain technology with examining blockchain regulations and relevant scholarly works. The study reveals no consistent policy has yet emerged around the world, except United States. Rather, countries have been left to their own devices, with some, such as those in Europe, incorporating regulation into national legislation and others avoiding the technology altogether. The study concludes by emphasizing the need of a regulatory legal framework for the blockchain technology.

Keywords— Blockchain law, Blockchain technology

I. INTRODUCTION- WHAT IS BLOCKCHAIN TECHNOLOGY AND WHY IS IT GAINING TRACTION

Blockchain technology can create a ledger for any type of record. The original Bitcoin blockchain records transfers of funds between different accounts, serving the same purpose as deposit currencies provided by banks. If blockchain technology significantly reduces transaction costs, the current monetary system based on central banknotes and deposit currencies may be replaced by Blockchain Technology. (Makoto Yano 2020). By providing a ledger that nobody administers, a blockchain could provide specific financial services like payments or securitization without the need for a bank.

Blockchain technology offers a secure and cheap way of sending payments that cut down on the need for verification from third parties and beats processing times for traditional bank transfers.90% of members of the European Payments Council believe blockchain technology will fundamentally change the industry by 2025. (CB insights 2021).

Blockchain technology also plays a prominent role in the existence of cryptocurrency. A cryptocurrency is a medium of exchange but is digital and uses encryption techniques to control the creation of monetary units and to verify the transfer of funds. Paper money is going away, and Cryptocurrency is a far better way to transfer value than pieces of paper. (Elon Musk 2019) Bitcoin and other digital currencies such as Ethereum use blockchain technology to function. As more and more people start using these digital currencies, the number of blocks will also grow, making the whole system more secure. The system is more efficient and has no transaction cost making the system cheaper too. (Mulligan 2019) However, the nodes on a blockchain may be situated anywhere in the globe and blockchain has the capacity to cross jurisdictional boundaries. This can result in a slew of complicated jurisdictional concerns that must be carefully considered considering the contractual ties at hand. An exclusive controlling law and jurisdiction provision is therefore necessary since it should provide legal certainty to a customer as to which law will be applied to establish the parties' rights and duties, as well as which courts would handle any disputes.

II. RESEARCH PROBLEM

Investment in virtual currency appears to have gain prominence in recent years. On the contrary, a new generation of blockchains and their applications is currently being developed and deployed. This paper investigates the role that the next generation of blockchains may play in the emerging data-driven society, as well as the need for blockchain laws and policies. In the Internet era, data is expected to become the third major production factor after labour and capital. Blockchain technology enables a new method of owning, sharing, and utilizing data. While the recommendations are being implemented concerning blockchain law, there is still a long way to go to total adoption and full regulation.

This paper seeks to advance the argument that due to Blockchain's ability to cross jurisdictional boundaries, it can pose several complex jurisdictional issues which require careful consideration in relation to the relevant contractual relationships. The principles of contract and title differ across jurisdictions and therefore identifying the appropriate governing law is essential. Accordingly, the paper seeks to provide an overview, scope, and applicability of the concepts in blockchain and emphasis this technology's loophole. Thus, in a decentralized environment, it may be difficult to identify the appropriate set of rules to apply. At its most basic level, every transaction may be subject to the jurisdiction of every node in the network. As a result, the blockchain may be required to comply with a large variety of legal and regulatory frameworks.

Thus, this study specifically focused on the research problem of Why is an exclusive controlling law and jurisdiction provision is therefore necessary for blockchain technology?

III. RESEARCH OBJECTIVE

The objective of this paper is to create awareness regarding blockchain technology and blockchain security threats. Therefore, we should educate ourselves about the blockchain technology and demystify it. If we 're able to understand it and implement relevant laws and regulatory statutes and know what we're dealing with, this will help us to manage risks and leverage value. Law enforcers must understand how blockchain technology is exposed to risk through its features and usability and find ways to control it.

Further, the focus of this paper is on the important phases of blockchain technology, analysing the specificities of code, the various benefits and drawbacks of regulation by code, and the ways in which law has, thus far, attempted to regulate code. This paper also investigates the importance of the incorporation of legal norms into code, and on the other, it focuses on the creation of code-based regulation. New kinds of regulation have evolved as a result of the extensive deployment of the global Internet network, which increasingly relies on soft law (i.e., contractual agreements and technological regulations) to govern behaviours. As more and more of our interactions are governed by software, we increasingly rely on technology not only as an aid in decision-making but also to directly enforce rules. Software and this blockchain technology thus end up stipulating what can or cannot be done in a specific online setting more frequently than the applicable law, and frequently, much more effectively. This paper also aims to analyse Blockchain Technology and examine the need for Blockchain Law because, despite its growing popularity among businesses and consumers, blockchain is still a relatively new technology in terms of legislation.

IV. RESEARCH METHODOLOGY

This research is mainly qualitative research carried out by the reference of scholarly books, journals, articles, conference papers, and online resources as secondary sources. Open-domain data were used for the analysis. This paper provides a brief overview of blockchain technology and the debate going over about having no need for the law and common arguments raised in relation thereof. The limitations of the study are that quantitative data is not deeply analysed because only a few countries have recognized the importance of legal certainty and a clear regulatory regime in areas pertaining to blockchain-based applications. The key limitation of the study is the absence of both domestic and international case law and research literature pertains to the main research problem.

V. WHY THE WORLD NEEDS THE BLOCKCHAIN LAW

The Blockchain has been called a haven for criminal activity (NY times 2020). The early focus on Blockchains was on Bitcoin as a private digital currency. The currency which is not controlled by territorial governments. Currency transactions have traditionally been extensively controlled to combat

fraud, money laundering, capital flight, currency manipulation, and terrorist financing. Blockchains are based on complicated technology, yet their essential function is straightforward: giving a widely disseminated but verifiably correct record. Even without a central administrator or master version, anyone can keep a copy of a dynamically updated ledger, but all those copies remain the same. The Blockchain, which is known as the technology most likely to change the next decade of business, deals with an unregulated currency that can easily become a haven for lawlessness, consumer abuses, and financial speculation (Maldonado 2018).

Blockchain-based systems will need to interact with legal procedures and institutions in order to realize their enormous potential and avoid catastrophic disasters. However, unless coders intentionally establish them, there are no legal intervention points for default rules to complete for businesses formed only on the blockchain. On the blockchain, there is no place for default law since it has no purchase. The lack of legal action has both positive and negative consequences. The most obvious legal issue in the case of bitcoins is anonymity. Bitcoin can be used to fund terrorists, buy and sell illegal narcotics, and make regular money "disappear" from legal scrutiny. It's also a means to conceal tax-sensitive transactions. Users can store and exchange precious assets with certainty due to distributed ledger technology. Finding a trustworthy individual or institution, on the other hand, is another matter. Therefore, the world needs Blockchain Law to be the mechanism to work alongside the technical trust architecture of the blockchain.

VI. THE LACK OF LEGAL INTERVENTION POINT IN BLOCKCHAIN TECHNOLOGY

The Blockchain gives its users the ability to avoid the pitfalls of partnership without resorting to organizational legislation, which is something that corporeally constituted entities lack. Entrepreneurs in the real world have every motivation to use business association law to avoid forming a partnership. The 2016 DAO (The DAO was a Decentralized Autonomous Organization that was launched in 2016 on the Ethereum blockchain. After raising $150 million worth of ether [ETH] through a token sale, The DAO was hacked due to vulnerabilities in its codebase) was a partnership of two or more people to run a business for profit as co-owners. It did not formally form under the jurisdiction of any state. As a result, it constituted a partnership under business association legislation, and its token holders were potentially exposed to infinite liability.

The Blockchain is a pseudonymous space, and that pseudonymity, along with the Blockchain's "code is law" characteristic, offers participants a level of safety that is not accessible in the real world. As a result, the blockchain eliminates both the penalty and the default from partnership law. Since Lessig's seminal work on "code as law," technology and law have been viewed as two opposing modes of ordering. Software code is a great tool for defining a software-based society's rules. (McKenzie 2017) But, after years of judicial battles, society has figured out how to subject code and digital technology to the rule of law to some extent. The blockchain can, all by itself, perform via contractual means what before now only organizational law could do. Blockchain technology, on the other hand, appears to be a very different beast. They aspire to elude the rule of law since its architectural elements are meant to permit the escape of effective regulation and enforcement. The complicated question is what will happen when gaps appear in the blockchain's nexus of contracts (Fairfield 2014). If the entity only exists on the blockchain, the law fails because there is no way for it to enter the code. However, if identifiable individuals organize entities on the blockchain, a legal intervention point exists at the intersection of the blockchain and the corporeal world, not in the blockchain itself. (Levi, Vasile & Neal 2018).

This Blockchain technology was born in the crypto anarchist underground of the Internet. Thus, Sovereign states all over the world are debating how to regulate the blockchain, inevitably focusing on this intersection as a legal issue. The nature of the blockchain, on the other hand, makes it difficult to apply traditional business law. Indeed, despite their partnership status, businesses created on the blockchain have de facto limited liability when it comes to contract claims.

VII. SMART CONTRACTS AND HOW THE BLOCKCHAIN WORKS

The Blockchain's version of traditional contracts is known as smart contracts. The terms are written in code and stored on a decentralized, immutable blockchain, making them self-executing. The concept of smart contracts was developed independently of

blockchain technology. Smart contracts which are self-contained software agents use Bitcoin's distributed ledger to perform transactions and run autonomously. The same consensus techniques that enable each node to have an identical copy of the ledger also enable it to carry out similar computations in the same order. While Bitcoin uses smart contracts to operate, it restricts their capabilities to simple fund transactions for security reasons (Fairfield 2014)

Ethereum, which debuted in 2015, is the most popular platform for smart contracts today. Ethereum has a Turing-complete programming language, which means that any application that runs on a conventional computer may theoretically be run on the consensus network's distributed computer. The decentralised, international, and pseudonymous character of blockchains creates possible conflicts between digital currency and existing regulations. Anti-money laundering (AML) rules, which impose monitoring duties for financial transactions, are used to demonstrate the idea. That's why it is identified that the significant difference between smart and legal contracts relates to execution and termination, also Smart contracts enforce obligations through autonomous code. Unless an appropriate termination option is written into the program, smart contracts are more difficult to terminate than conventional agreements. Smart contracts are also more dynamic than traditional legal contracts, because performance responsibilities can be altered over time via trusted third-party sources. In terms of clarity, precision, and modularity, smart contracts are advantageous. We might see a world of complex smart contract libraries used not only a la carte in contractual arrangements but also to enable machine-to-machine transactions in the future. (Johnston 2016)

There are some main smart contract restrictions, which are still unaddressed in the current state of the technology. First, there are privacy considerations, which may make them unsuitable for use as a substitute for traditional contracts in transactions requiring confidentiality. Second, smart contracts are insufficient to formalize certain sorts of legal duties. This includes the previously mentioned open-ended provisions of continuous partnerships that must be updated on a regular basis. Third, the pseudonymous nature of the contract's parties, which complicates error rectification and enforcement. Fourth, widespread deployment of smart contracts could lead to standardization and "automation bias," leading in the acceptance and implementation of flawed contracts with limited modification options. Finally, the primary issue could be the possibility for illicit or immoral behaviour to be enabled by smart contracts and blockchains.

VIII. PRECEDENCE OF BLOCKCHAIN TECHNOLOGY

A blockchain is frequently referred to as a decentralized ledger. The term "ledger" refers to an old term for a "book of the permanent record." A blockchain is a distributed ledger that was created in a decentralized manner. Many independent entities contribute to the creation of a book of permanent data that is accurate and unfalsifiable in this process. Records that are accurate and unfalsifiable are extremely valuable. A county recorder's office keeps vital records pertaining to real estate (land) ownership as well as debts or liens against it. It would be nearly impossible to trade land and/or lend and borrow money with land as collateral without these records. (Makoto Yano 2020).

Blockchains have demonstrated that such trusted records can be decentralized stored on the Internet. Decentralizing the recording process, which has traditionally been centralized and overseen by the government, is expected to significantly reduce transaction costs (or the cost of creating and maintaining a ledger). That is one of the reasons why many people have embraced blockchain technology. A blockchain allows you to designate the owner of each piece of data, trade data pieces, and market them by creating a data ledge. By replacing the cumbersome, paper-heavy bills of lading process in the trade finance industry, blockchain technology can create more transparency, security, and trust among trade parties globally. The future of money is digital currency. (Bill Gates 2018) The adoption of Blockchain, cryptocurrency, and virtual assets is rapidly increasing, according to a recent Chainanalysis (Chainalysis: The Blockchain Data Platform) report, 92 percent of the 154 countries studied had some sort of cryptocurrency activity. The way we work, bank, and live in the future may look very different from how we do now, with some of these technologies underpinning our basic activities. (Povey 2020).

IX. DRAWBACKS ON BLOCKCHAIN TECHNOLOGY

Recently, wild speculative activities have targeted blockchain currencies and businesses. Blockchain

currencies have been widely used in money laundering and drug trafficking. Social perceptions of blockchain are rather negative as a result of these activities, which have given the blockchain industry the image of a risky business. (Chris Dai 2020). However, if better blockchain laws are developed and a healthy market infrastructure to support the blockchain market is established, the industry will have a bright future. Blockchain laws would be able to contribute to the development of a cyber ecosystem in which the blockchain industry can thrive.

In order to manage IoT (Internet of Thing), large data in a blockchain, a new blockchain on which smart contracts may be performed is required. (A smart contract is a computer program that executes software commands according to the smart contract's specifications for each scenario). As a result, it reduces the expense of dispute resolution that would otherwise be borne by a regular contract; under a standard contract, a disagreement is generally handled by a court. (McKenzie 2017). In modern society, many social obligations are enforced centrally by laws. In a smart contract, in contrast, transactions are enforced by a computer algorithm, which can be expected to wipe out any contractual disputes. This, however, does not imply that the contractual arrangements in a blockchain are free from dispute.

"Blockchain, bitcoin, crypto assets, virtual currencies, a whole new vocabulary describing innovative technology to swiftly transfer value around the world." The fast-evolving blockchain and distributed ledger technologies have the potential to radically change the financial landscape. But, their speed, global reach and above all - anonymity - also attract those who want to escape authorities' scrutiny." (Financial Action Task Force). This technology has the potential to improve compliance (for example, DLT can be used to bring more transparency to business transactions and speed up global commerce). However, it has the potential to be advantageous to criminals, the anonymity provided through blockchain can create a haven for bad actors to operate within). While crypto assets do not pose a threat to global financial stability at this point, we remain vigilant to risks, including those related to consumer and investor protection, anti-money laundering, and countering the financing of terrorism. (G20 Finance Ministers and Central Bank Governors Meeting, Fukuoka, Japan, June 9, 2019)

Blockchain laws and regulations are under construction, so this is not clear-cut. Too much regulation stifles growth and adoption at a time when the world is crying out for advancements and improvements in how business is conducted, but too lax an approach allows criminals to run wild and exploit regulatory gaps. (Povey 2020). This is what Joel Reidenberg (1998) has coined Lex Informatica a concept which has subsequently been popularized as "Code is law" by Lawrence Lessig (1999). We could say that with the advent of blockchain technologies, the law is progressively turning into code.

X. DEBATE ON WHY DO WE NEED THE LAW OF BLOCKCHAIN?

Law and technology can influence each other in a variety of ways. The two interact through a complex system of dependencies and interdependencies, as both contribute (to varying degrees) to regulating individual behaviour. The relationship between the two has significantly evolved with the advent of modern information and communication technology, as the latter is increasingly used as a complement or supplement to the former. Lawyers, judges, and policymakers are increasingly surrounded by digital information and software tools that they rely on in their daily work. Recently, new technology has emerged that has the potential to change the way we think about law. The blockchain is the foundational tool for peer-to-peer value creation and trust less transactions. It is a decentralized, secure, and incorruptible database (or public ledger). The technology, which was introduced in 2009 with the Bitcoin network as the underlying infrastructure for a decentralized payment system, (Nakamoto 2009) has rapidly evolved to take on a life of its own.

The blockchain is now used in a wide range of applications, from financial to machine-to-machine communication, decentralized organizations, and peer-to-peer collaboration. The blockchain, as a trustless technology, eliminates the need for trust between parties, allowing the coordination of many individuals who do not know (and thus do not necessarily trust) each other. At the other end of the spectrum, the most recent blockchains have enabled people to upload small snippets of code (so-called smart contracts) directly onto the blockchain, where they can be executed decentralized by every node in the network. Even if they do not reflect any underlying legal or contractual provision, these rules are automatically enforced by the underlying blockchain technology. (De Filippi &Hassan 2016)

Some proponents suggest that blockchain technology could lead to a society where self-enforcing rules would supplant traditional laws (Nakamoto, 2008). Indeed, with the advent of blockchain technology and the introduction of smart contract capabilities on top of it, it becomes increasingly appealing for people to bypass the traditional legal framework of contract law, and to rely on the underlying technical infrastructure provided by the blockchain instead.

A new approach to regulation is known as the codification of law, which entails a growing reliance on code not only to enforce but also to draft and elaborate legal rules. Because smart contracts can be used as both a supplement to and a replacement for legal contracts, the lines between what constitutes a legal or technical rule are becoming increasingly blurred as a result of technological advancements. Indeed, while most smart contracts are not directly associated with a legal contract, depending on how they are entered, they may or may not give rise to an actual contractual relationship in the traditional sense of the term. However, smart contracts can be used to emulate, or at least simulate, the function of legal contracts through technology, effectively turning law into code. (Rodrigues 2018)

Accordingly, as more and more contractual provisions are implemented in the form of a smart contract (as opposed to a legal contract), the blockchain progressively acquires the status of a "regulatory technology"., a technology that can be used both to define and incorporate legal or contractual provisions into code and to enforce them irrespectively of whether there subsists an underlying legal rule. (Buterin 2018)

The blockchain could be the most significant advancement in information technology since the Internet. The blockchain, which was designed to support Cryptocurrency, (digital currency), is something more: a novel solution to the age-old human problem of trust. Excessive or premature application of strict legal obligations will stifle innovation and miss opportunities to use technology to achieve public policy goals. Blockchain developers and legal organizations can collaborate. Each must recognize the other system's distinct affordances. This Blockchain technology has tremendous potential. However, in the absence of effective governance and law, this approach may not promote trust at all. Blockchain-based systems may be completely independent of legal enforcement. This can be counterproductive or even dangerous. And they are less protected from the reach of the law than they appear. The central question is not how to regulate blockchains, but how blockchains regulate themselves. (Werbach 2018).

XI. GLOBAL DATA PROTECTION LAW AND LAW OF BLOCKCHAIN

The first thing to remember when considering the application of data protection regulations to blockchain/distributed ledger technology is that there is no such thing as a global data protection law. Despite the fact that overarching principles like Article 12 of the Universal Declaration of Human Rights and the OECD Privacy Principles developed in the 1980s provide a common source for many data protection regimes around the world, there is significant variation. Despite this complexity, when it comes to compliance with privacy and data protection standards in the context of blockchain and distributed ledger implementations, there are several fundamental themes that are expected to emerge in most, if not all, jurisdictions. Many data protection rules make it much more difficult to deal with anonymous or pseudonymous data. In many circumstances, data relating to an unidentified individual will fall outside the purview of data protection rules. There are two sorts of prospective creditors for any business: voluntary and involuntary (tort) creditors. In terms of the former, in order for an obligation to arise, the blockchain code would have to describe the terms and circumstances of loans. In that case, Data "controllers" (usually, primary collectors of personal data from end users) and data "processors" (usually, secondary holders of personal the who operate on behalf of data controllers) are clearly defined in several jurisdictions, particularly in the EU are equally responsible for compliance. (McKenzie 2017)

The ramifications of these distinctions will vary based on the Distributed Ledger Technology (DLT) implementation's nature and each participant's level of autonomy. Most public blockchains, on the other hand, have each node deal with the data it gets as a totally independent operator rather than sharing it with other nodes. While many data protection laws are aligned to some extent, this is still a field of law with significant differences between jurisdictions (Johnston 2016). For public and private distributed ledger technology implementations, blockchain laws in their numerous iterations around the world pose a genuine and current compliance barrier. Privacy by

design, which is a motto for privacy regulators around the world, should truly be a key component of any new implementation (Maldonado 2018)

XII. BLOCKCHAIN LAW AS AN EVOLVING LAW

A. United States

The state-by-state regulation of data breach notification is a good example of the US's legal diversity: each state has its own rules governing the circumstances in which entities must notify regulators and individuals of actual or potential data breaches, as well as the processes for such notifications. Aside from healthcare, the financial services industry is one of the most heavily regulated in the United States, which means that public blockchains containing US nodes will have to consider and comply with a wide range of regulations. The United States has yet to develop a consistent legal approach to cryptocurrencies, with laws varying by state. The Financial Crimes Enforcement Network (FinCEN) does not yet consider cryptocurrencies legal tender; however, the Internal Revenue Service (IRS) considers cryptocurrencies to be property. The fragmentation of US privacy and data protection law is perhaps its most distinguishing trait. In practice, there is no overarching legislation governing data protection; instead, data collectors must navigate a tangle of state and federal rules, many of which apply to specific data sets in certain industries.

New York was the first state in the United States to regulate virtual currency enterprises through state agency rulemaking in June 2015. As of 2019, 32 states have introduced or enacted legislation accepting or encouraging the use of Bitcoin and blockchain distributed ledger technology (DLT), with a handful already having done so. Despite some agencies' involvement, the federal government has not used its constitutional pre-emptive right to regulate blockchain to the exclusion of states (as it does with financial regulation), allowing individual states to enact their own laws and regulations.

B. UK and the Europe

The European Union (EU) has taken a constructive and welcoming stance to blockchain technology in general, but it has only recently introduced official law to regulate it. The EU signed the 5th Anti-Money Laundering Directive (5AMLD) into law on January 10, 2020, bringing cryptocurrencies and crypto service providers under regulatory scrutiny for the first time. However, because permissioned DLT systems involve known and trusted parties, history entries can be changed if a sufficient number of the parties' consent to an erasure. Participants in the Ethereum network, for example, went through a similar procedure to reclaim assets lost in the infamous "DAO attack. "When a data controller (for example, a node in a public blockchain) makes personal data public, exercising the right requires the node to take reasonable steps, including technical measures, to notify other controllers of the erasure request. Controllers must consider the available technology as well as the cost of implementation while fulfilling this requirement.

The right to be forgotten, which is now part of EU law according to Article 17 of the new General Data Protection Regulation, poses a unique challenge for open blockchain systems. Article 17 establishes a "right to be forgotten" for personal data, subject to certain conditions and limitations. These efforts are precursors to a more united approach; the chair of the Financial Stability Board (FSB), based in Switzerland, stated in February 2020 that financial authorities must speed up the process of building a complete regulatory framework for cryptocurrencies. The letter, written to finance ministers and G20 central banks, urged global authorities to act quickly – specifically, to examine the dangers and benefits of stable coins in order to stay up with the crypto market's rapid pace of innovation and development and avoid losing control (Insider Intelligence 2021).

Given the Internet's and Blockchain's opacity, the European Union has found it difficult to establish clear and strict rules (anonymity provided by IP addresses, data being moved quickly, locations disguised via a virtual network, etc.). Sanctions in the cyber world are proving nearly impossible to apply in the same way as sanctions against arms dealers or nuclear proliferation activities. (Povey 2020)

C. Australia

The existing law, the Australian Privacy Act, allows for data offshoring but requires the transferring company to verify that the data is held in line with the standards of Australian privacy law by the recipient. This is often accomplished through contracts that oblige recipients to adhere to certain criteria, but with a public blockchain, this is unlikely to be viable. The heightened focus on cross-border transmission of personal information has been a fundamental component of Australian privacy law since a significant round of legislative amendments in 2014.

Under Australian law, the entity transmitting the data out of Australia is accountable for any breaches by or on behalf of the recipient entity or entities, implying that any Australian node in a public blockchain might face severe liability under present laws (Maldonado 2018)

D. Singapore

The challenging concerns, such as the treatment of anonymous and pseudonymous data, and questions about the de-identification and re-identification of data, maybe ambiguous in the context of new and emerging technologies like blockchain and DLT implementations. Rather than possessing any specific regions of significant difficulty, the nascence of Singapore's privacy law is a fundamental aspect. Singapore's Personal Data Protection Act was first enacted in 2013; therefore, it does not yet have the same history or precedent in data protection law as other countries, such as those in Europe (Insider Intelligence 2021). Of course, these concerns are not unique to Singapore, as much of the law governing data protection in the Asia Pacific region has also evolved rapidly in the last five to ten years.

E. Sri Lanka

The Sri Lankan chapter to Blockchain and Cryptocurrency Regulation does not exist. Also, there is currently no consolidated or specialized data protection legislation in Sri Lanka. There are some industry-specific data protection-enabled laws. However, such legislation lacks a definition for the term "data" as well as precise implementation provisions. With the increased use of technology in the Covid-19 epidemic, where practically all social, educational, and local commercial transactions are conducted on the internet, the number of crimes recorded has increased dramatically, according to Comprehensive Error Rate Testing reports (Moody's Analytics 2019) The demand for blockchain laws in Sri Lanka has been steadily growing, highlighting the importance of issues relating to the protection of persons' and other entities' privacy and data. It is not against the law in Sri Lanka to sell or buy cryptocurrencies. But due to its decentralized and anonymous character, CBSL (Central Bank of Sri Lanka) has not issued any licenses or authorizations to any company.

XIII. CRYPTOCURRENCY AND BLOCKCHAIN REGULATIONS AROUND THE WORLD

Some countries, however, believe that accepting cryptocurrencies will lead to a loss of economic control and a global movement toward decentralized economies. China, Russia, and Colombia are among the countries that have outright outlawed Bitcoin and other cryptocurrencies, making their usage and investment illegal. The cryptocurrency was initially treated with caution in China but has recently received some support. The People's Bank of China banned initial coin offerings and cryptocurrency exchanges in 2017 and attempted to eradicate the industry by making token sales illegal. As a result, the largest exchanges ceased trading. All of this changed in 2019 when a Chinese court ruled that Bitcoin was digital property. Since then, there has been a shift in cryptocurrency adoption, with Chinese President Xi Jinping urging an increase in blockchain development efforts. There is still some skepticism, but China is unquestionably a developing country.

As institutional money enters the market, several economists foresee a significant shift in crypto. Furthermore, there is a chance that crypto will be listed on the Nasdaq, (American stock exchange based in New York City which is ranked second on the list of stock exchanges) which would provide legitimacy to blockchain and its usage as a substitute for traditional currencies. If there isn't a functioning rule of law, to begin with, the blockchain-based rule of law could be a major improvement (Brunner 2020). Several billion individuals in the poor world, for example, do not have access to bank accounts and the benefits that come with them, such as quick payments and credit where Bitcoin and other cryptocurrencies provide a quick solution to the unbanked problem. (Mulligan 2019)

XIV. BLOCKCHAIN CODE VS LAW

The blockchain has ignited the flame of cyber-libertarianism. A conversation regarding blockchain and law can be framed in two ways: Is it possible to have legal and administrative oversight of these technologies? Should they, in fact, be? Governments and large private organizations will not be easily disintermediated, based on the preceding two decades' experience. They developed strategies to limit internet activity if they had a strong desire to do so. A similar trend appears to be emerging for blockchain activities, where the stakes are high enough that governments will not just relinquish control. The first involves breaking the law using cryptocurrencies or stealing cryptocurrency through hacking and other methods. The fact that bitcoin can be used to pay for drugs does not automatically make it illegal; Russian rubles or gold bars can be used in

the same way. Even when transactions are completely digital, peer-to-peer, cross-border, and cryptographically secure, network providers and users might be recognized and subjected to territorial legal obligations. Furthermore, outside of illegal or high-risk activities, there are few incentives for most users to adopt new legal systems where the existing ones are adequate (Ferrari, João & Alexandra 2019).

Already, regulatory battles over blockchain-based systems are raging. The illegality, classification, and legal validity are some major forms of legal controversies. There's also the issue of how other legal systems see distributed ledgers. States are beginning to handle blockchain-based data in the same way they regard traditional records. Delaware passed legislation allowing distributed ledgers to be used for government records as well as regulatory services like tracking business shares. However, there are numerous specific questions to address, and various jurisdictions that must act, just as there are with categorization difficulties. To be sure, there are crucial considerations concerning where to draw the boundary between acceptable and unacceptable technological usage. Criminals and terrorists will try to take advantage of the blockchain, just as they do with other technology. Governments will overreact and impose restrictions that will harm legitimate operations in the process. The point is that these aren't brand-new issues. They should also not be interpreted as proof of a fundamental conflict between the blockchain and the rule of law. New services that do not seek to contravene the law are the more intriguing scenarios. By introducing a powerful new mechanism for trust and compliance, to what extent does the blockchain render existing legal regimes obsolete? And to what extent do existing legal frameworks place undue restrictions on blockchain-based innovation?

Surprisingly, one option for the blockchain to establish more robust confidence is through the judicial system. There are a few ways to combine the distributed, algorithmic trust structures of the blockchain with the human-interpreted, state-backed institutions of law. In some cases, legal assistance will not be required (Lessig 2006). Existing legal arrangements function normally without any integration in other cases where the blockchain is just supplemental.

However, in many circumstances, proactive actions are required to combine the finest features of distributed ledgers and centralized law (Kevin 2017).

XV. UN'S CONCERN ABOUT BLOCKCHAIN LAWS AND REGULATIONS

Blockchain, for example, is cross border; as a currency and a technology, it transcends national borders and therefore necessitates a united, multilateral legal regulatory approach. It also necessitates those persons working in the public service around the world be more than merely technically savvy; they must be mindful of how their regulations might be interpreted in code. The United Nations Children's Fund has become the first UN entity to possess and trade cryptocurrencies. The UN Children's Fund will now be able to receive, retain, and disperse bitcoin donations through a newly established Cryptocurrency fund. Also "The UN Climate Change Secretariat sees the potential of blockchain technology to contribute to improved climate action and sustainability," said Massamba Thioye, who is in charge of UN Climate Change's DLT and blockchain research. The UN World Food Program conducted a successful pilot in Jordan in 2017 utilizing the Ethereum blockchain to track food aid distribution to 10,000 Syrian refugees. In an area where traditional legal enforcement is impossible, the program provided accountability. We need to be taught how to handle the digital highways upon which our society is currently being created in the same way that we learn the rules of the road before driving. According to studies, just around a third of the public can comprehend the data and statistics that make up the open data movement's outputs. (Mulligan 2019)

From a technical standpoint, the call to inclusion, trust, and multilateralism that blockchain tries to address will continue for many decades, and we will need to find new ways to respond through governments, civil society, academia, non-governmental organizations, and international organizations like the United Nations. According to Cathy Mulligan, Member of the United Nations Secretary General's High-level Panel on Digital Cooperation; and Expert and Fellow, World Economic Forum Blockchain Council has emphasized on the fact that "The regulation of digital technology is a critical subject that requires multilateral attention. Although numerous projects to establish such legislation have been launched around the world, we must widen our understanding of those

efforts as well as human rights concepts across the digital business." (Mulligan 2019)

We can address our current emergent technologies and have plausible frames of reference for ones that haven't even been thought of yet by developing proper multilateral solutions legally through conventions and treaties. Rather than categorically adopting or rejecting such technologies, we must give them due thought and collaborate to analyse and handle their consequences.

More significantly, codes created in one country under a specific set of laws may affect citizens in another country. It is still uncertain how these instances will be addressed.

XVI. BLOCKCHAIN IMPLEMENTATION IN PANDEMIC

The COVID-19 has demonstrated that traditional supply chains are not always resilient or adaptable enough to handle a pandemic or other large-scale disaster. Many companies, for example, experienced severe supply chain disruptions during the pandemic, perhaps most notably in the healthcare sector, which was disrupted by shortages of critical medical equipment and supplies. Companies were already looking into the potential of blockchain to update various elements of their supply networks before the COVID-19 pandemic. While there was enthusiasm for using blockchain to usher in a new digital era in the supply chain prior to the pandemic, many organizations believed that implementation could be postponed. The COVID-19 outbreak, on the other hand, has prompted a shift in attitude.

There have been reports of blockchain research and implementation to resolve stubborn supply chain issues since the outbreak. For example, in the early days of virus response, blockchain was considered for applications such as connecting medical providers with needed equipment during the COVID-19 outbreak and potentially producing reliable COVID-19 immunization passports stored on a blockchain. Even the use of blockchain technology to prevent price gouging is being considered. In a related development, blockchain-based contract tracing apps are being developed to improve mobile users' privacy protections by storing digital data in a cryptographically secure manner. Many businesses have yet to realize its potential and the numerous ways in which blockchain may be utilized to improve operations or establish new service offerings, but as its uses become more widely known, momentum is building. (Brunner 2020).

XVII. CONCLUSION

The blockchain, like the Internet, is a foundational technology whose ramifications could be felt all over the globe. Law and distributed ledgers, on the other hand, are required to move forward. Blockchain developers cannot ignore the law, but neither can governments ignore the blockchain's growing importance. Adapting the law is one method to close the gap. As regulators, legislators, and courts grapple with the problems and opportunities presented by this basic new technology, some of this will naturally occur. The procedure can be sped up by using more different requirements.

The issue for countries and the judiciary, then, is how to deal with this emerging blockchain technology when they come across it. It's extremely complicated, we're all discovering and attempting to understand it together. There are threats and opportunities, as with all risks. Clearly, we must adhere to regulations and laws; however, what happens when those laws are unstable or unavailable? Similarly, what happens when new technology emerges at such a rapid pace that regulation is unable to keep up? There are so many new products and novel ways of moving value around the world that criminals are poised to exploit that regulator face a formidable challenge in keeping up. Significant capital investments in blockchain technology firms have already begun to be made by public businesses and individual investors. As commercial blockchain installations become a reality, this tendency is expected to accelerate. Transactional attorneys who are responsible for doing due diligence on the purchase and/or sell-side in connection with these investments should be familiar with blockchain technology and the developing business models that are built on it. It's possible that traditional due diligence methods may need to be tweaked. Ownership of data stored on decentralized ledgers and intellectual property ownership of blockchain-as-a-service offers based on open-source blockchain technology platforms, for example, will be distinct challenges. These considerations must be made in the context of the company value proposition and competitive entry barriers.

As a result, the conclusion highlights that there are still legal points of intervention in the blockchain's connection with the actual world, rather than in the

blockchain itself. Governments throughout the world should govern the blockchain, just as they did the Internet before it, and think about how the law might apply to the technology.

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AUTHORS BIOGRAPHIES

Mathumitha Karunananthan is an undergraduate at the faculty of law of General Sir John Kotelawala Defence University. She followed a Diploma in Diplomacy and World affairs at Bandaranaike International Diplomatic Training Institute. She has completed the School Mediation Program by the Ministry of Justice Sri Lanka and the South Asia Program by The Stimson Center US. She's interested in Public International Law, Aviation Law, and is currently focused on the security threats in the cyber domain, blockchain, and cryptocurrency regulation.

Fathima Ameera Mohomad Imthiyaz is an undergraduate at the faculty of law of General Sir John Kotelawala Defence University. She has completed a Diploma in Information Technology. She is trilingual and interested in developing insight into the Law and Policy Dimensions of Ocean Governance. She also has accomplished a Certificate of Leadership Development program by the Lions Club of Kottawa Metro. She is currently following the International Commercial Arbitration Program by The Moot Court Bench Sri Lanka. Her Interest areas are International Maritime Law, Law of Contract, and Information Technology Law.

A Comparative Literature Review of the Contribution of Transgender Rights in the Legal Context of India and Sri Lanka

DPDN Kularathna# and SASP Hansitha

Department of Legal Studies, Open University of Sri Lanka

#dhanushka01@yahoo.com

Abstract - Discrimination against any condition that a person acquires on their birth goes beyond the criteria of equality. The society has long created different social conditions for these two parties based on gender difference that has been biologically available to both men and women. Transgender people have identities different from the gender that corresponds to the sex organs determined at birth. The study is based on evaluating the level of contribution to establishing transgender social rights within legal systems of India and Sri Lanka. In comparison, transgender people have a stronger historical presence in India than in Sri Lanka. It is observed that the international legal context of transgender rights makes a positive contribution to gender orientation and gender identity. The legitimacy of American realism, sociological and natural law schools can also emphasize the legitimacy of securing transitional social rights. Accordingly, the statutory authorities and the Sri Lanka community should contribute to the expeditious preparation of legal provisions to develop transgender social rights while upholding the Indian legal position.

Keywords— transgender rights, equality, t hirdgender

I. INTRODUCTION

The definition of humanity must be based on justice and fairness because the discrimination that any individual acquires based on any condition he or she acquires at birth transcends the criteria for equality in humanity. Gender is different and more complex than biological sexuality. (How does a person perceive the world? How does a person know himself based on that? How to present it to the world? and how will it be re-conceptualized or acquired by the world?) Sex, Gender, and Sexual Orientation have different meanings socially and psychologically. Gender is the difference in sexuality from birth. Society has long created different social conditions for these two parties based on gender difference that has been biologically available to both men and women.

Transgender people are people with identities different from the social gender that corresponds to the sex organs determined at birth. This category includes people who change their genitals to suit their identities and those whose genitals do not change or are half-changed, and it is difficult to measure their sexual orientation or social gender-based on heterosexual norms. Everyone in the transgender community has a legal right to determine their sexual orientation and identity. As transgender people are not considered men or women or are not recognized as third genders, they lose many of the rights and privileges enjoyed by other people as citizens of this country. People with transitional social status have lost social and cultural participation and are restricted from access to education, health care, and public places. It violates their constitutional guarantee of equality and the right for equal protection from the Law.

II.RESEARCH PROBLEM

This research aims to conduct a comparative literary inquiry into whether the Indian and Sri Lankan legal contexts have made a significant contribution to the establishment of transgender social rights within their legal framework.

III. LITERATURE REVIEW

In India, Transgender Community consists of Hijras, eunuchs, Kothi, Aravanis, Jogappas, Shiv-Shaktis, and so forth. They have a strong historical existence, as mentioned in Hindu mythology and other religious texts. The concept of the Trinity or the eunuch was also an integral part of Vedic and ancient literature, and it can be seen that there was a good social acceptance of transgender people during the Middle Ages and the Mughal Empire. Nevertheless, the

imperialist colonial rule has made a huge difference to the transgender community. Transgender peoples are said to have enjoyed equal or heterogeneous political rights with other genders in earlier eras. With the rise of the Christian empire, laws against transgender people were first enacted around the fourth century. Around the end of the sixteenth century, the awakening of liberal thought first sparked a discourse on the rights of those marginalized by gender and sexual orientation. The Nachchi community, the oldest transgender community in Sri Lanka, can be considered a minor sexual community which is endemic to Sri Lanka and can be identified as a group of gay and transgender people who have gathered in local cities of the island since the 19th century.

There are identities such as pandaka, ambiguous, and impotent in Buddhist literature and male and female. In Ayurveda philosophy, this anatomical difference is known as "Narashanda" and "Nari Shanda". However, the fact that these communities did not live as separate community reveals that they lived here without any distinction like the other parties. Living as a separate community because of sex is necessary because of the marginalization and discrimination caused by sex.

To review the context of international Law on transgender rights, attention should be drawn to Article 1 of the Universal Declaration of Human Rights (U.D.H.R.) 1948. Article 2 of the U.D.H.R. clarifies that the transgender community should have the same rights and dignity as other members of society. Article 6 of the U.D.H.R. also emphasizes that every person has the right to be recognized before the law. Under Article 7 of the U.D.H.R everyone has the right, individually and collectively, to develop, discuss, and support human rights ideas and principles. Article 12 and Article 17 of the International Covenant on Civil and Political Rights – 1966 (ICCPR) state that "no person shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence." According to Articles 6,7 and 17 of the International Covenant on Civil and Political Rights - 1966 (ICCPR), every human being has an inherent right to life. Law protects this right. No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, no one should be subjected to medical or scientific experiments without his or her free consent. Also, no one shall be subjected to arbitrary or unlawful interference with others' privacy, family, home, or correspondence, or his honour and reputation shall be unlawfully infringed upon, and all persons have the right to legal protection against such interference or assault. Paragraph 21 of the U.N. Convention Against Torture & Other Cruel, Inhuman Degrading Treatment or the Punishment states are obligated to prohibit, prevent, and supply. Articles 31 and 32 of the Vienna Convention on the Law of the Truths 1969 explain the applicability of the above international Law to Indian Law.

In 2006, a group of international human rights experts introduced the "Yogyakarta principles", a series of International sexual orientation and gender identity principles in Yogyakarta, Indonesia. Thus, The Right to the Universal Enjoyment of Human Rights, The Rights to Equality and Non-Discrimination, The Right to Recognition before the Law, The Right to Life, The Right to Privacy, The Right to the Highest Attainable Standard of Health, Protection from Medical Abuses also outline how the rights of transgender people should be optimally covered and how states should intervene. The United Kingdom has passed the General Recommendation Act, 2004. The act also provides for the legal recognition of a person's acquired gender and the provisions relating to their legal rights, marital status, succession, social security, and pensions, highlighting the consequences of the newly acquired gender on their rights. The Equality Act, 2010 - U.K.; repeals and replaces nine different laws, including the Sex Discrimination Act, 1986. The act empowers public institutions to eliminate all forms of discrimination, harassment and violence Through Australian Sex Discrimination Act 1984/2013 - 41, Hungarian Equal Opportunities Act 2003, E.U.E.U. Paper on T.G.T.G. person rights 2010 by the European Union, Argentine Law on Gender Identity 2012 and, German Civil Status Act 2013 / Article 22 / Sec 3 efforts are being made to give legal force to the subject of individual rights. In 2017, the Canadian Human Rights Act and the Criminal Code were amended to recognize transgender people as a third gender. In 2017, the Pakistani Senate passed the Transitional Human Rights Protection Bill, and in 2016 the United States Department of Education and the Department of Justice instructed public schools to allow transgender people to use bathrooms that match their gender identity. Following Eric Fanning's appointment as Secretary of the U.S. Army, Eric became the first civilian to act as a transgender community in the U.S. military, and in 2011 the ban on homosexuality in the U.S. military was lifted.

However, in 2017, President Donald Trump signed an order banning transgender people from joining the United States military.

IV.RESEARCH METHODOLOGY

To analyse the Contribution of Transgender Rights in the Legal Context of India and Sri Lanka, the study has used eight main variables. In addition, constitutional security, legal security for confirmation and recognition, statutory legal security, legal security for the promotion of social status, legal recognition as the "third gender", right to education, and right to marriage are used as the independent variables. Through these variables, the study is trying to prove the sufficiency of rules and regulations in the Sri Lankan legal framework by comparing it to the legal framework of India.

V. FINDINGS

A. Indian legal system

1) Legal status

The Constitution of India empowers the Supreme Court and the High Courts in writing to enforce/protect the individual's fundamental rights. A person who has violated his or her rights through an arbitrary administrative action can go to court to seek redress. Articles 32 and 226 of the Constitution of India give jurisdiction to the Supreme Court. Under these provisions, the Supreme Court is allowed to relax the traditional rule of "Locus Standi" and file public interest litigation (P.I.L.) at the request of enthusiastic citizens.

2) Constitutional Security

Article 15 and Article 16 (2) state that no citizen shall be discriminated against or discriminated against based on religion, race, caste, gender, place of birth, residence, or any of them. Also, Article 16 (4) cites a specific provision on the subject of transitional social rights, stating that "the government shall not prevent the appointment or appointment of backward class citizens who are not adequately represented in the services provided by the Government." Article 16 (4) cites a specific provision on the subject of transitional social rights, stating that "the government shall not prevent the appointment or appointment of backward class citizens who are not adequately represented in the services provided by the Government." Article 19 (2) does not impose any restrictions on one's appearance or choice of clothing, subject to the limitations contained therein.

3) Statutory legal security

Under the Indian Criminal Tribes Act of 1871, the Hijras were inherently considered 'criminals' and 'addicted to the systematic commission of non-bailable offences. Article 377 of the Indian Penal Code has been violatef there, and in 2018 the Supreme Court of India repealed Article 377 of the outdated, imperialist, Victorian Penal Code, which criminalizes homosexuality.

4) Legal security for authentication and acceptance

The Transgender Persons (Protection of Rights) Bill 2016, drafted based on the N.A.L.S.A. ruling that year, was introduced in the Lok Sabha in 2016. In the same year, the Indian Parliament proposed a three percent quota for government jobs for transgender social workers who later voluntarily changed their sexual orientation.

Tamil Nadu government banned Reassignment Surgery for babies, or the Central Cabinet approved intersex babies who do not know whether their biological sex belongs to both sexes at birth in 2019 and the proposal to introduce Transgender Bill of India. The Bill defined transgender people to include the majority of the broad identities that belong to transitional society. It Includes;

- a transgender man or transgender woman who does not match the gender assigned to that person at birth
- a person -who undergone gender reassignment surgery or hormone therapy or laser therapy, or other treatments
- Intersex person
- Hijra, Aravani, Jogta (who Defined as "a person with sociocultural identities")
- someone who wants to be of the opposite sex.

5) Legal security for the upliftment of social status

The Government of Tamil Nadu established the Transgender Welfare Board in April 2008 for facilitating. it includes;

- Free Transgender Reassignment Surgery (S.R.S.)
- Free housing program
- Preparation of Various citizenship documents
- Enrollment in government colleges with full scholarships for higher education

- The establishment of self-help groups (for savings)
- launch of income-generating programs (I.G.P.s)

In May 2008, the Tamilnadu authorities ordered a "Third Gender" option for admission to government colleges. In 2009, Election Commission allowed the transgender community of India to refer to the gender of the ballot as "other". 2014, in N.A.L.S.A. Case; the landmark judgment of t India, the Supreme Court of India legalized the introduction of transgender people as the third gender. The N.A.L.S.A. ruling provided for the protection of the rights of the Hijras and Eunuchs under Part III of the Constitution of India and by-laws enacted by Parliament and the State Legislature, allowing them to be treated as a "Third Gender" other than bisexual gender. To provide legal facilities for transgender people to legally recognize their gender identity as male, female or third gender, to treat them as socially and educationally backward citizens, to make reservations for them in admission to educational institutions and employers, and to provide medical facilities Central and State governments were also instructed to improve welfare schemes.

6) Legal security for social acceptance

In N.A.L.S.A. Case, the court emphasized that programs should be designed to ensure that the identity of transgender people is recognized by society. The need for programs and planning for this was emphasized to the State and Central Governments. Accordingly, individuals with that "third gender" should be considered "socially and educationally backward groups" from education and workplaces. In the N.A.L.S.A. case, the court recommended that opportunities be provided for them and that social welfare programs benefit the community.

7) Right for education

In 2017, the first boarding school for transgender adults was opened in Cochin, Kerala, India.

8.) The right to marry

In 2019, under Article 21 of the Constitution, *Arun Kumar v. The Inspector General of Registration and others* granted the right to marry to Transgender people. The judgment also affirmed that the bride's definition under the Hindu Marriage Act included transgender people identified as women.

B. Sri Lankan legal system

1) Legal status

Compared to India, Sri Lanka's cultural heritage shows that transgender people are not encouraged to engage in transgender activities, and Sri Lankan transgender people seem to be discriminated against due to their lack of recognition of their rights.

2) Constitutional Security

Article 12 of the 1978 Constitution of Sri Lanka emphasizes that people should not be discriminated against based on gender and primarily cover gender identities. Although there are constitutional provisions for identifying transgender people in Sri Lanka, previous cultural barriers have negatively acknowledged this reality because people see it as an act of immorality.

3) Statutory legal Security

The pronoun "he" in Article 7 of the Penal Code of Sri Lanka 1883 and its derivatives are used to denote both genders, and Article 7 has not been amended. It can therefore be considered irrelevant to the subject of transgender people. Sections 365, 365 (A) of the Penal Code (Amendment) Act No. 22 of 1995 prohibit "unnatural sexual intercourse" and "gross misconduct between persons", which are used primarily to say that Law prohibits transgender acts in Sri Lanka. Thus, this can be identified as a denial of transgender sexual behaviour in Sri Lanka and a form of criminal treatment. (India has now decriminalized this situation - Indian DNS377). Initially, only male transgender acts were punishable under the Law, and in 1995 (365 (a)), the Law was amended to make it possible to punish Female transgender acts. It is an offence to pretend to be someone else in Article 399 of the Penal Code, and this Law is often misinterpreted and misused against transgender people.

It is important to note that transgender people are more likely to be convicted of sexual misconduct because they are not properly described in the Law, and that law enforcement should be responsible for determining the motives behind the concealment of a person's identity. The use of a 138 - year - old, obscure set of laws to discriminate against transgender, bisexuals, and transgender people is also seen as a vital opportunity for legal reform.

By voluntarily criminalizing the sexual acts committed by adults in private places and, by interfering in personal relations with which the State has no right to interfere, the right to assembly is denied under Article 14 (1) (c) of the Constitution.

Many individuals violate the same protection and discrimination provided for under Article 12 of the Constitution by subjecting them to discrimination in employment, denial of health care, etc. The Marriage Registration Ordinance No. 19 of 1907 does not recognize a transgender marriage. The vagrant's Ordinance is widely used against transgender people and sex workers.

Emergency regulations, Prevention of Terrorism Act (1978), Quarantine and Prevention of. Diseases Ordinance. (497 / 30-9-1940), the Obscene Publications Ordinance (1927), and the Penal Code (1883) identify the high risk of disproportionate and unjust use of various laws against transgender societies, such as the offence of inciting religious hatred.

legal Security for authentication and acceptance from June 16, 2016, transgender people in Sri Lanka will change their identities such as Gender Recognition Certificate, Birth Certificate, and National Identity Card, which is a victory for the Sri Lankan transgender community. However, to obtain it, one must first be certified by a relevant specialist psychiatrist in charge of the Ministry of Health, Nutrition, and Indigenous Medicine, where the transgender person does not have the right to self-perceived gender identity. Further, the definitions and methods used in Sri Lankan law do not include many people with different identities in the range of transgender identities, therefore they have to be limited to two choices, male or female. It should also be emphasized that this creates an unfair position on transgender people who do not require gender reassignment.

A comparative examination of the Indian and Sri Lankan contexts reveals that transgender legal Security has been established in both countries through constitutional provisions and affirmation and recognition of identity. However, reaping the full benefits of the concept of public welfare litigation; The Indian Legal System has been able to create a comparatively positive legal environment for the rights of legal status, statutory legal Security, legal Security to uplift social status, legal recognition as "Third gender", legal Security for social recognition, the right to education, and the right to marry.

VI. JURISPRUDENTIAL ASPECTS

What is the Law? There is no definite answer to this, and there are different interpretations from different perspectives. American realists believe that law is a precarious phenomenon, and it is an accepted norm for a judge to exercise his or her discretion in situationism, which develops on judges' interpretation.

According to H.L.A. Hart, a professor at Oxford University, UK can be interpreted as the judge wishes because law is not a full weave, and there are holes in that weave. The judge can, at his discretion, close such loopholes to prevent offenders from escaping the law. Judges such as Bhagwat and Krishna Iyer have developed the concept of "public welfare litigation" to enable anyone to sue an aggrieved party. Often the victim's poverty, lack of understanding of the injustice, and the fact that the aggrieved party is unrecognizable make it possible to sue someone else interested in the injustice.

It was inspired by the American realist jurisprudence, in Indian Law, with judges ***Suresh Kumar Koushal and another v. N.A.Z. Foundation and others*** case, ***N.A.Z. Foundation v. N.C.T. Delhi*** case, ***Navtej Singh Johar v. Union of India*** (Article 377 of the Indian Penal Code decriminalized in 2018 by this case) helped to develop statutory provisions in India through their judgments. Thus, it is clear that India has taken a leading and developing position in transgender sexual rights compared to other countries in the region.

Sri Lankan law is also evolving into a judicial system in which individual and collective rights emerge, and judges need to continue to give a broader definition of social reform and individual rights.

According to the Natural Law School, law is the most appropriate tool for civilizing human society. Philosophical focus on the values concepts of justice and fairness of law, the willingness of society to achieve the above concept through the application of the law, how social interests reflected on the application of the law, and the application of the law to balance the conflicting rights of society. More critical commentators, such as Aristotle and Aquinas, argued that "there must be a strong connection between law and social tradition and that law must be fair and just."

People born with the same intelligence and abilities at birth are discriminated against and abused by society because of their selfish behaviours and motives. Transgender people are also part of society and have the same right to enjoy all other people's rights. The peculiarity is that they are discriminated against by society. page 88 of **N.A.L.S.A. judgment**

states, "the concept of ensuring the dignity of the individual included in the preamble of the Constitution of Equality and Opportunity from the Socio-Economic and Political Situations of Justice is designed to produce the personality of the citizen."

In post-traditional liberal democratic theories of justice, the underlying assumption is that people have equal value and should be treated equally with equal laws. Thus, justice and fairness can be considered two unconnected and unrelated concepts, and these concepts are essential to the existence of a good human society.

According to Roscoe Pound, Irene, and Erline, the School of Sociology founding speakers, law is a tool for balancing conflicting interests. Accordingly, the role of law is more important to maintain social stability by balancing the conflicting human aspirations.

In countries such as Sri Lanka and India in the South Asian region, transgender rights are denied based on the circumstances charged by the contemporary religious and cultural environment, as they view the community as behaving contrary to their religious teachings. For example, the Code of Penal Code's word "unnatural sexual behaviour" is a synonym for biblical teaching. The influence of the Christian religion was initially met with greater opposition to the subject of the transgender community in the West. However, with the post-industrial revolution, the idea of a transgender community in the European region became more humane and egalitarian.

According to Islamic Law, transgender sex is not allowed in most Islamic countries. According to them, the transgender community conflicts with the "natural" order in which the God created man, destroying family and marriage.

However, the transgender community also has the right to enjoy equal rights from the health and social welfare sectors of a state; to reform the legal conditions that create conflicts with those institutions; to recognize their right to vote as citizens; to stand up for their goals and endeavours, to receive formal education and to pursue a career of choice based on qualifications. Therefore, discrimination, employment, education, housing, HIV / AIDS risk and hygiene, stress, overuse of hormone pills, tobacco and alcohol abuse, gender reassignment surgery, marriage and adoption, identity certification, and the insecurities associated with ageing can never neglect their right to experience the same situation as any other citizen in several related issues.

When it comes to criminal liability, it can be seen that they are also relatively more likely to be punished when they are charged with a crime, and this kind of discrimination is by no means justifiable from sociological viewpoint.

VII. RECOMMENDATIONS AND FUTURE STUDY REQUIREMENTS

To ensure that the Government of Sri Lanka abides by its Constitution and other legal documents, Sections 365, 365 (A), and 399 of the Penal Code must be decriminalized under Sri Lankan law. In addition, the vagrants Ordinance should be removed. The government should then ensure that any person's real or perceived sexual orientation or gender will not be used to target and harass them and that if they are subjected to such harassment, there should be a mechanism in place to make complaints and safely investigate. It should also ensure that all relevant cases are properly investigated, and appropriate action is taken to punish the perpetrators.

Accordingly, states that focus on balancing equality and recognized rights should implement social engineering and create a database on transgender people. Formal programs should be set up to address their problems, and provisions should be made to admit transgender people to government schools and colleges. The governments also need to create new job opportunities and programs for transgender people and educate the community. They need higher education and vocational training to improve their earnings and status, and they need proper medical care, including health insurance.

Accordingly, it provides special legal protection against discrimination on bisexual, and transgender people (L.G.B.T.I.Q.) and violence perpetrated by State and civil society and related legal proceedings and following points could be suggested as initiatives.

- Eliminating sexual orientation and gender segregation through a constitutional amendment, legal reforms will make civil rights accessible to all, regardless of gender/gender identity, under the law, such as the right to obtain a passport/ration card/inheritance and adoption of children.

Establishment of Vocational Training Canters to provide new career opportunities for transgender people

Issue guidelines to ensure a sensible and respectful treatment in various popular media (including movies, the Internet, and television)

Focus on developing programs to bring transgender people on an equal footing with other citizens and change society's attitude towards them.

VIII. CONCLUSION

Laws criminalizing transgender acts were imposed on Sri Lanka during the British Empire, and many similar laws in Britain and elsewhere have been repealed. Also, there is no evidence that homosexuality was a crime in this country before the colonial era. However, it is important to understand that transgender, which is not 'female' or 'male' in gender, is also a social construct. Therefore, it is important to provide 'awareness' to eliminate transgender, bisexual or transgender - phobia.

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AUTHOR BIOGRAPHIES

The author is a final year student of the Department of Legal Studies, Open University Sri Lanka and a Medical Officer in Sri Lanka Ayurveda Medical Service, and a Former Visiting Lecturer in Gampaha Wickramarachchi Ayurveda Institute. She holds BAMS(Hons) in Ayurveda Medicine and Surgery (University of Kelaniya). Her research areas are Gynaecology, Cosmetology, Medical Tourism, Human Rights, and Jurisprudence Law.

The Author is a final year student of the department of Legal Studies, Open University Sri Lanka. He holds a BA(Sp) in Social Statistics from the University of Kelaniya, and BSc. Business Administration from the University of Sri Jayawardhanapura.

Child-Friendly Justice and the Best Interest of the Child: A Comparative Analysis of Sri Lanka, India, and International Standards

BMP Bandaranayake

Faculty of Law, University of Colombo

prineethab@gmail.com

Abstract – A child is generally regarded as a person below the age of eighteen years. Even though some diversions can be found from this general concept in special instances, it is an undoubtedly accepted principle that the best interest of the child is the paramount consideration in any disputed situation. This concept shall be regarded as the fundamental ground of a child-friendly justice system. This system intends to ensure a child to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others and seeks to guarantee the respect and the effective implementation of all children's rights. After a comprehensive study of the existing juvenile justice systems in Sri Lanka and India, it was discovered that Sri Lanka requires more measures to eliminate the practical difficulties a child faces during a court proceeding and to ensure the best interest of the child in a child-friendly juvenile justice system.

Keywords— best interest of the child, child-friendly justice, Children and Young Persons Ordinance, Juvenile Justice (Care and Protection of Children) Act, Protection of Children from Sexual Offences Act

I. INTRODUCTION

The ideology that, "every child, whose life has become interweaved with the legal system, deserves a special and a unique attention" is not an alien concept. With this ideology, comes the conspicuous concept of "Child-Friendly Justice". It is a well-known fact that children who come into a court of Law often get psychologically and socially victimized, which results in additional trauma to themselves. Thus, child-friendly justice espouses the objective that the judicial system of a country can be a persuasive, dominant, and compelling tool to effectively and positively shape the life of a child who comes into contact with courts. The international child-friendly justice jurisprudence unveils valuable substantial principles that allow children to enforce their rights and persuade States to establish and promote child-friendly court procedure policies.

Best Interest of the Child concept (BIC) is the prominent consideration in family law when ascertaining issues regarding children. South African courts have notably emphasized the gravity of this conception in child custody judgments. Even in Sri Lanka, since the landmark judgment of *Muthiah Jeyarajan v. Thushiyanthi Jeyarajan and Others,* this concept has played a prominent role in family law matters relating to children. When the courts determine any matter regarding a child's welfare and upbringing, they are obliged to give considerable weight to the substantial preferences and feelings of the child concerned. This has to be determined as per the factual circumstances of each case, concerning the child's personal sphere including but not limited to age, understanding, social status, and relationship.

The United Nations Convention on the Rights of the Child (UN CRC) enunciates this Best Interest of Child concept without providing an explicit definition. It provides for states' general obligation of preserving this interest. Article 3 (1) of the UN CRC, declares that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Sri Lanka is also a state party to this convention. Thus, it can be contended that, in the case of children who encounter the law, among other relevant factors, it is essential to acknowledge the concept of Best Interest of Child as well, to assure the protection of law these children deserve.

A. Statement of Problem

Child-Friendly justice is an important aspect of the administration of justice in Sri Lanka. In an adversarial justice system, the judge must play a crucial role to discover the truth from the accused, victims, and witnesses. When the accused or the victim is a child, the courts generally adhere to the best interest of the child principle. However, the position of Sri Lankan law regarding this concept is somewhat contested. Even though that concept is theoretically there in the justice system of Sri Lanka, it is reasonable to argue that, when compared to other jurisdictions and international standards of the best interest of the child concept, the practicability of the concept in Sri Lanka is not adequate.

B. Research Question

Does Sri Lanka have adequate measures to ensure the practicability of the best interest of the child in a child-friendly juvenile justice system?

C. Research Objectives

This paper pursues to accomplish the following objectives: (a) to analyse the definition of the child, (b) to evaluate the legislative framework of child-friendly justice in Sri Lanka, (c) to compare the juvenile justice systems in Sri Lanka and India, (d) to appraise the adequateness of the existing legal framework of Sri Lanka regarding a child-friendly juvenile justice system.

D. Methodology

The researcher has used the doctrinal research methodology for this research, i.e., the use of secondary sources. Thus, landmark judgments, articles, journals, and websites have been used and analysed to fulfill the research objectives.

II. THE DEFINITION OF "CHILD"

A. International Legal Context

Generally, a "Child" can be defined as a young person between infancy and puberty or as a person who has not yet attained the age of majority. But some definitions of a child include a foetus too. Black's Law Dictionary defines a child as a person who has not reached the age of 15 years. The UN CRC defines a child as "a human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". In the guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, a child is defined following the said definition of the UNCRC. However, the Havana Rules, Riyadh Guidelines, and Beijing Rules define persons who are below eighteen years differently, in contrast to UNCRC. Therefore, it is apparent that a uniform definition of the child cannot be found in these international legal instruments.

B. Sri Lankan Legal Context

When addressing the Sri Lankan context, a slight diversity can be found in Sri Lankan legislation concerning the definition of the Child. Notably, most of these legislations have defined the term child with recognition of the physiological and biological differences of the children, which includes their ability to understand and maturity. It can be argued that by being human and because of his vulnerability based on immaturity, a child below the age of eighteen years is entitled to rights.

The *Age of Majority Ordinance* (Sri Lanka) interprets that, "all persons when they shall attain, or who have already attained, the full age of eighteen years shall be deemed to have attained the legal age of majority, and, except as is hereinafter excepted, no person shall be deemed to have attained his majority at an earlier period, any law or custom to the contrary notwithstanding." However, section 3 of the Age of Majority Ordinance declares that "Nothing herein contained shall extend or be construed to prevent any person under the age of eighteen years from attaining his majority at an earlier period by operation of law." which somewhat creates a confusion about the legal definition of child in the said Act.

The *Children and Young Persons Ordinance* (Sri Lanka) is the fundamental legislation of Sri Lanka that concerns the juvenile justice system. While this Ordinance defines a child as a person under the age of fourteen years, it further defines that "a person who has attained the age of fourteen years and is under the age of sixteen years as a young person (a juvenile)". There are no provisions for children between sixteen to eighteen years of age and they are neither considered children nor young persons. This interpretation is controversial to the UN CRC definition of a child, which shall be under eighteen years of age. Thus, it leads us to the contention that, for this Ordinance, a child who is above 16 years can be recognized as an adult.

However, the *Youthful Offenders (Training School) Act* (Sri Lanka) identifies those who have reached the age of sixteen and who have not yet reached the age of twenty-two as youthful persons. According to that Act, a detention order can be given by any court and

not necessarily by the juvenile court. Therefore, it is evident that the Sri Lankan law recognizes 3 categories, namely; children, those who are under the age of fourteen, young persons or juveniles, those who are between fourteen to sixteen years, and the youthful offenders, those who are between sixteen to twenty-two years. It can be asserted that this dichotomy makes the task of implementing juvenile justice principles difficult, ambiguous, and unequal.

Section 5 illustration (a) of the *Penal Code* (Sri Lanka), states the minimum age of criminal liability is eight years as provided by the general exception provided in section 75. However, the Penal Code (Amendment) Act No. 10 of 2018 raised the minimum age of criminal responsibility in section 75 to twelve years but the upper limit remains undefined. Even though section 76 provides for the criminal liability of children between twelve to fourteen years age group, criminal liability of the children in between fourteen to eighteen years age group remains undefined. Section 83 defines the minimum age to give consent as twelve years, as a defence to criminal liability.

C. Indian Legal Context

In India, a child is defined as anyone under eighteen years of age as per several main Indian national laws and policies. Section 2 (12) of the Juvenile Justice (Care and Protection of Children) Act 2015 (India) defines a child as "a person who has not completed eighteen years of age". Additionally, a child in conflict with law is defined as "a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence" and goes on to define the characteristics of a child in need of care and protection. Furthermore, the said Act defines the best interest of the child as "the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development" and child-friendly as "any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child."

The National Policy for Children 2013 (India) adopted on April 26, 2013, by the Ministry of Women and Child Development, intends to include all aspects of the development and welfare of the child and it aims to protect and encourage the rights of the children to survival, health, nutrition, education, development, protection, and participation. This policy can be regarded as a gradual improvement of policies regarding children, from the first policy made by the Government of India for child welfare - The National Policy for the Child, 1974. In its preamble, a child is defined as "any person below the age of eighteen years."

The Protection of Children from Sexual Offences Act 2012 (India) underlines the intent to "protect children from offences of sexual assault, sexual harassment, and pornography and provide for the establishment of Special Courts for a trial of such offences and matters connected therewith or incidental thereto". Section 2 (d) of the said Act also defines the child as "any person below the age of eighteen years."

Thus, it is apparent that, unlike in Sri Lanka where there are several age limits in defining a child, in main legislation related to child protection, India has a unanimous interpretation of a child.

III. CHILD-FRIENDLY JUSTICE

A. International Legal Framework

Conceptually, child-friendly justice seeks to minimize the challenges that children face during a court proceeding. However, it is noteworthy that none of the international legal instruments define the concept of "Child-Friendly Court Procedure". Child-friendly court procedure is mainly aimed at building the confidence of children about the justice system as a reliable, trustworthy, and solution-giving mechanism about their spectrum of issues. Thus, several international instruments regarding child-friendly justice, (which provides for the best interest of the child as well) can be found, which were enacted with the hope of eliminating the agonizing encounters a child face during legal proceedings in an adult court and to provide them the full access to justice which is essential for them to bring their violations of rights. However, it must be noted that these rules, which are mainly implemented through UN General Assembly Resolutions, are not legally binding per se, and are commonly referred to as "soft law" instruments that have an influential impact and a sense of moral obligation on UN member countries, concerning strengthening the juvenile justice systems.

1) United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules):

These rules, which were originally drafted at a conference in Beijing and were initially recognized as the Bill of Rights for Young Offenders, have been implemented cause of a UN General Assembly Resolution, on 29th November 1985. Beijing rules are concerned with the treatment of Juvenile and Underage Offenders and prisoners. This main objective has been declared in Rule 5, where it has been stated that "The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence." It can be contended that the phrase "well-being of the juvenile" is equivalent to the concept of Best Interest of Child, which can also be regarded as the universal standard of treatment of a child.

Part 3 of the Beijing Rules, which is concerned with the matter of adjudication and disposition regarding juvenile offenders, Rule 14.2 states that "The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely." Furthermore, in Part 4 of the Beijing Rules, which provides for non-institutional treatment, it has been stated that, "Efforts shall be made to provide juveniles, at all stages of the proceedings, with necessary assistance such as lodging, education or vocational training, employment or any other assistance, helpful and practical, in order to facilitate the rehabilitative process."

Thus, it is evident that, the promotion of the well-being of the juvenile is the paramount consideration of the Beijing Rules.

2) *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines):*

Beijing Rules are focused on the structure and operation of the juvenile justice system and do not include proper provisions for prevention. Riyadh Guidelines fulfil this lacuna. These guidelines were adopted and proclaimed by UN General Assembly Resolution 45/122 of 14th December 1990. They seek to "affirm the importance reducing juvenile delinquency plays on reducing crime, the necessity of implementing the guidelines according to a child-centred approach, and the communal responsibility for children's well-being from the earliest ages onward."

Rule 4 declares that, "In the use of the Guidelines for Action at both the international and national levels, consideration should be given to the following: (a) Respect for human dignity, compatible with the four general principles underlying the Convention, namely: non-discrimination, including gender-sensitivity; upholding the best interests of the child; the right to life, survival and development; and respect for the views of the child." Rule 20 states that, "In order to maintain a link between the detained child and his or her family and community, and to facilitate his or her social reintegration, it is important to ensure easy access by relatives and persons who have a legitimate interest in the child to institutions where children are deprived of their liberty, unless the best interests of the child would suggest otherwise." Also, Rule 43 provides that, "In accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, States should undertake to ensure that child victims and witnesses are provided with appropriate access to justice and fair treatment, restitution, compensation and social assistance. If applicable, measures should be taken to prevent the settling of penal matters through compensation outside the justice system, when doing so is not in the best interests of the child."

Thus, it is evident that, the promotion of the well-being of the juvenile is the paramount consideration of Riyadh Guidelines as well.

3) *United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules):*

The Havana Rules, which hoped to eliminate the widespread practice of incarceration of children back then, were adopted to encourage the use of alternatives to imprisonment and to ensure that juveniles in custody have their basic rights protected, instead of calling for better and more prisons for juveniles. These rules were adopted and proclaimed by UN General Assembly Resolution 45/113 of 14th December 1990. The Havana Rules define a juvenile as every person under the age of 18 years and defines deprivation of liberty as any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.

Thus, it is evident that, the promotion of the well-being of the juvenile is the paramount consideration of the Havana Rules as well.

B. Sri Lankan Legal Framework

Child-Friendly Justice anticipates guaranteeing the respect and the effective implementation of all children's rights at the highest attainable level. It empowers a judicial umbrella that protects all children's rights. It ensures that, in matters related to the law, the interest of every child is always protected, no matter who the children are or what criminal conduct they have allegedly done. However, in child-friendly justice, the main focus is on the protection of the rights of juvenile offenders. Here, the best interest of the child should work as an interpretative principle of superior judicial consideration of children's rights and aim at ensuring the "maximum satisfaction of their rights" at the domestic level. Consequently, courts should ensure children's progressive participation and autonomy in all proceedings in which children are involved.

When observing the Sri Lankan context, there are several ways, in which a child comes into contact with law. These ways include, but not necessarily limited to,

i. Juvenile Offenders.
ii. Children who are victims of offences committed by adults and young persons.
iii. Children who are in court as a witness or a necessary party in a litigation. (Specially in adoption, maintenance, custody and domestic violence cases)
iv. Children in need of care and protection as defined by the section 34 of the Children and Young Persons Ordinance.
v. Children who are simply in the court premises due to various reasons. (Especially when the mother, father or the guardian of the child is a party to a litigation and the child is too young to be left alone at home)

However, unlike the exhaustive legislative framework of India regarding the protection of child rights, Sri Lanka does not have updated legislation. A major part of the main legislation about children, such as the *Children and Young Persons Ordinance* (Sri Lanka), is very dated and needs to be amended. Therefore, to make the court process child-friendly, it is essential to bring in amendments to the existing procedural and substantive laws or at least issue new regulations or guidelines for the judiciary to make the court procedures more child-friendly and to introduce internationally accepted best practices concerning children who came in contact or conflict with the law.

The *Children and Young Persons Ordinance No. 48 of 1939* (Sri Lanka), is the main legislation relating to juvenile justice in Sri Lanka. Section 02 of the said Ordinance provides for juvenile courts. A Juvenile Court is a "Court of summary jurisdiction sitting for the purpose of hearing any charge against a child or young person or for the purpose of exercising any other jurisdiction conferred on a Juvenile Court by or under this Ordinance or any other written law." These courts are presided over by a Children's Magistrate and sit in a place separate from other courts. In Sri Lanka, there are three juvenile courts so far – in Colombo 1, Anuradhapura and the ongoing project in Jaffna.

As per section 11 of the *Children and Young Persons Ordinance* (Sri Lanka), the right of privacy of the juvenile offender is protected, whereby it is stated that, unless the publication is of a bona fide character and does not include any personal information about the child or young person concerned in the juvenile judicial proceedings, "no report of any proceedings before a Juvenile Court shall be published in any newspaper, magazine, or other journal." Moreover, the juvenile court has been empowered to clear the court room while a child or young person is giving evidence as a witness in certain cases, which is significantly important to ensure the right of privacy of the child.

Also, to maintain the best interest of the child by providing a child-friendly atmosphere, the Ordinance prohibits the children being present in the court during the trail of other persons and requires "separation of children and young offenders from adults in police stations, Courts and etc." Furthermore, as per section 16 of *the Children and Young Persons Ordinance* (Sri Lanka), a child-friendly atmosphere is created in the juvenile court room by permitting his parent or guardian to attend to the judicial proceedings (unless it is not unreasonable to require so).

Therefore, it can be contended that, even though it is not expressly stated in the Ordinance itself, the requirements included in the *Children and Young Persons Ordinance No 48 of 1939* (Sri Lanka) are centred upon protecting the best interests of the child in a child-friendly court procedure.

C. Indian Legal Framework

The main Indian legislation regarding juvenile justice is the Juvenile Justice (Care and Protection of Children) Act 2015 (India). This Act deals with two

types of children, (a) children who are in conflict with law (b) children who need care and protection. Juvenile Justice Act is comprised of several principles to ensure the best interest of the child in a right based approach in all litigations relating to children, including juvenile offenders. These principles include but not limited to the principle of presumption of innocence, principle of best interest of the child, principle of reparations and restorations, principle of privacy and non-discrimination, and the principles of natural justice. This Act has omitted the word "arrest" to make it more child-friendly. However, in contrast to the Juvenile Justice Act, 2000 (India), this Act provides more rigorous punishments for offenders, but does not award death penalty or life imprisonment for juvenile offenders.

As stated in its preamble, this Act is enacted with the intention of amending "the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs .. by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established." To cater this intention, Juvenile Justice Act has constituted the Juvenile Justice Board, "for exercising the powers and discharging its functions relating to children in conflict with law under this Act." This Board consists of a Principal Magistrates and two social workers. Including social workers, who have the ability to evaluate the psychological and social background of the child is important for the Principal Magistrate to determine the merits of the case on an age-appropriate basis. No court will be a child-friendly court unless the emotional needs of a child are understood. Thus, it is of the best interest of the child to assist the Principal Magistrate with childcare professionals.

Juvenile Justice Act 2015 (India) provides a special procedure in relation to children in conflict with law. As soon as they are apprehended by the police, they "shall be placed under the charge of the special juvenile police unit or the designated child welfare police officer" who would produce them to the Juvenile Justice Board without undue delay. Such children are prohibited to be placed in a jail by the proviso of section 10 of this Act. It is important that at no time during the child's presence in the police station or while being transported to court should they come into contact with adult offenders. Provisions of section 10 of the Juvenile Justice Act (India) ensures this psychologically significant factor.

Moreover, Juvenile Justice Act 2015 (India) provides for the parent or guardian of a child in conflict with law to be present at the Juvenile Justice Board. And it prohibits joint proceedings of a child in conflict with law and a person not a child. Furthermore, "notwithstanding anything to the contrary contained in the Code of Criminal Procedure 1973 (India), or any preventive detention law for the time being in force, no proceeding shall be instituted and no order shall be passed against any child under Chapter VIII of the said Code." This is of the best interest of the child to make the court atmosphere more child-friendly.

Another important Indian legislation regarding juvenile justice is the Protection of Children from Sexual Offences Act, 2012 (India). As clearly stated in its preamble, the Act intends "for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child." To protect the right of privacy of the child. Section 22 of the Protection of Children from Sexual Offences Act (India) provides for a procedure for media which is to be adhered in a Special Court. Accordingly, "no person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy" and "no reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child", unless the Special Court may permit such disclosure.

Chapter VII, section 28 of the Protection of Children from Sexual Offences Act (India) provides for the designation of Special Courts. Under this Act responsibility is vested with the Special Court to create a child-friendly atmosphere, by allowing a family member or a person of the child's choice to be present in the Court. Here the Special Courts are created to avoid the undue delay of the court proceedings, which is an apparent case of Sri Lanka as well, whereby there are a few juvenile courts. Section 35 of the Protection of Children from Sexual Offences Act (India) provides for speedy trials, where it is stated that the "evidence of the child shall be

recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court."

Furthermore, the Protection of Children from Sexual Offences Act (India) emphasizes upon customized procedures to include the special needs of the children. Thus, it requires the assistance of an interpreter or expert while recording evidence of child and in the case of a child having a mental or physical disability, seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications and experience to record the statement of the child. Also, it mandates that the child victim should not be exposed to the accused at the time of testifying and the physical atmosphere of the Special Court includes screens, curtains and single visibility mirrors to fulfil this requirement. These aspects reaffirm the objective of this Act, that "the law operates in a manner that the best interest and well-being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child."

Therefore, it can be contended that, as per clearly stated, the requirements included in the Protection of Children from Sexual Offences Act 2012 (India) are also centred upon protecting the best interests of the child in a child-friendly court procedure.

IV. CONCLUSION AND RECOMMENDATIONS

Accordingly, it is evident that, theoretically, these two legislations – the *Children and Young Persons Ordinance No 48 of 1939* (Sri Lanka) and the Protection of Children from Sexual Offences Act 2012 (India), intends to ensure the best interest of the child in a child-friendly court procedure. But certain practicable issues can be found which are almost common to the provisions of both legislations. However, this paper only intends to analyse the practical issues in the juvenile justice system of Sri Lanka.

The main practical issue is the identity of the child. Except for at the juvenile courts; where there are exclusively designated waiting for areas for children to be physically present waiting for their cases to begin, children have to be in the normal courthouse atmosphere with other adult offenders and the general public. Especially, since it is not a regular incident for a child to be in the court compound, children at the general waiting space always draw the attention of the attendees to the court. Furthermore, they have to use the same washroom and canteen facilities as adults. This violates the right to privacy and confidentiality of the child. Thus, for the best interest of the child, it can be recommended to create a physical space in every courthouse to be used exclusively by children which shall include a room with a mind soothing atmosphere, a clean washroom, and a small canteen.

Furthermore, it can be contended that it is not in the best interest of the child to be exposed to all the information that transpires in court. It could be mentally traumatic and disturbing for the child to listen to all these systemic procedures. Thus, it would be in the best interest of the child if there is a possibility of avoiding the need for the child to be present at the court physically. However, it should be noted that the *Evidence (Special Provisions) Act No 32 of 1999* (Sri Lanka) provides for video recording of a child's interview to be produced as evidence. But the child has to attend to the court physically to be cross-examined. To avoid that possibility, it is recommended to introduce Gasell Chamber concept to Sri Lanka for juvenile cases. Gasell Chamber is a room in the court, with a one-way mirror where judges, lawyers, and investigators can observe and hear the evidence of a child through that mirror. This room has the technology of recording audio and video evidence as well. Therefore, it is reasonable to assume that a child would rather be mentally assured in witnessing in such a room and would be able to express himself/ herself without anxiety.

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AUTHOR BIOGRAPHY

B. M. Prineetha Mivandi Maheepala Bandaranayake is a third-year student at the Faculty of Law, University of Colombo, and also studies as a Final Year student at the Sri Lanka Law College. Her research interests are in Criminal Law, Family Law, and Public International Law.

A Comparative Analysis of Medical Negligence Compensation in Sri Lanka for the Protection of Patients

HLNS Chandrasiri

Centre for the Study of Human Rights, Faculty of Law, University of Colombo, Sri Lanka

#nadeeshahl@yahoo.com

Abstract - Sri Lanka provides free health service to all the persons in the country through establishing and maintaining nearly five hundred government hospitals in every province and district. Sri Lanka scored 76th place in World Health Organization statistics with higher regional life expectancy and lower maternal and infant death rate. This study analyzed the level of duty of care maintained by the trained medical staffs in Sri Lanka, in order to secure the betterment of the patients. The situations had reported where mistakes and errors of medical professionals' duties lead to physical, mental injuries or even a death of their patient. But, in practical a handful of medical negligence litigations are hardly to find out. In this research journey, both primary and secondary medico-legal sources were attracted to follow the qualitative research method. Finally, the study analysed the success stories of consumer protection, insurances, and strict liability in other jurisdictions with comparative jurisdictions.

Keywords— medical negligence, Sri Lanka, consumer protection

I. INTRODUCTION

From the day man being civilised always look to believe in keeping orders. Then gradually introduced the concept of law in order to protect the innocents due to an unreasonable act or omission of superior. Usually the remedy is in seek of pecuniary damages or punitive damages. Same ideology is with medical matters of today's engagement of development. Actually no one is perfect with everything. Even a person who is well knowledgeable with the special skill might do mistakes. This is same for medical professions also where their mistake can lead to minor injury or sometimes for severe injuries as death. However, there has to be a justice and a satisfactory remedy to the victims of medical negligence. Best interest of the patient (consumer) is the purpose even it is a patient oriented or medical professional oriented. On the other hand, professional negligence is a one term and medical negligence is a special branch coming under members of professionals and services.

II. METHODOLOGY

This research is looking for analytically evaluate the ups and downs of prevailing medical negligence compensation law to protect consumer with the great expectation of achieving the research question and objectives as stipulated. In practical, for several years the health professionals, administrative of hospital and innocent patients have been struggling with awarding compensation in breach of owed duty of the liability with a medical negligence. However, medical negligence lies completely with civil law and case facts. Criminal negligence is another view that rarely practice. Four elements as duty, breach of duty that duty made damage and causation between duty and damage need to prove in order to win negligence litigation by the plaintiff the person bring the action. So, the defendant does not need to prove his innocence. However the doctor's legal representatives within his protection society will energetically present their side. An exception to general burden of but it will be great if proof the onus can shift to doctors to prove that was not negligence. Today, there are more successful methods following in all throughout the jurisdiction. Countries like India are been following statues like consumer protection. New Zealand, Sweden and Finland are some countries that attracted by no-fault system that victim (consumer) is compensated irrespective of medical negligence of medical professions and administrative. Other than that professional liability insurance is famous among most Americans as an essential coverage to physicians and other medical professionals like dentists, nurses, pharmacists in order for liabilities arising out of negligence that results in patient's injuries and death.

III. ANALYSIS AND DISCUSSION OF FINDINGS

A Analysis

1) Negligence in general

The modern law concept of negligence light up with concept of 'love your neighbour' from the wording of Lord Atkin's at 1932 case law of Donoghue v Stevenson. With the merits of the negligence the interpretation from Palsgraff v Long Island Railroad Corporation, Hay or Bourhill v Young, Caparo v Dickman, Hill v Chief Constable of West Yorkshire and Osman v UK grow up with new vocabulary including foreseeability, proximity, fairness, justice and reasonableness even in the absence of a contract. So, the traditional definition brings up with the idea of take reasonable care to avoid acts or omissions which can reasonably foresee the damage to your neighbour as well as your ultimate consumer. Theoretically, law used to satisfy duty, breach of duty, damage bring with breach and causation with four elements in order to establish negligence according to authority of Lochgelly Iron and Coal Co v McMullan.

2) Medical Negligence

Medical negligence is a special branch from negligence. It leads to a complaint or litigation about inadequate standard of medical care given to a patient. Bolam test is the indicator that looks for four elements in the failure to perform an owed duty with a reasonable degree of skill and care in the diagnosis and treatment of a patient causing damage in some bodily, mental of financial disability In most of the countries there are societies, non-profit organisations that advice, defence and insurance on their medical professional members. Civil and Criminal medical negligence are the two types generally followed by every jurisdiction all over the world. Medical negligence litigations are very serious and need a deep concentration with medical and legal technological and terminology practicality. In reality there are few alleged medical negligence cases are reported. Some cases have gone up to courts and most of them have been settled outside. So, it is hard to find a simple or clear cut of medical negligence litigation that award compensation. Often the lawyer have to collect a great deal of information and wisely analyse all circumstances. Ankur Arora Murder Case is a brilliant movie directed by Mr. Suhail Tatari which lime light the well-known medical profession's act of omission to perform an owed duty cause to a breach in medical negligence. It is a story of innocent boy who was unable survive after an appendectomy due to negligent pre operational care. However, mother of this boy strong enough to expose the fatal flaws in medical profession throughout the film.

3) Civil medical negligence

Sometimes civil medical negligence is known as malpractice. In general terms all patients have their right to expect satisfactory, standard medical care, treatment, management from the admission and after care. Everyone complete their duty with some self-confidence and guarantee success with the academic and clinical practices they gain from training and experiences. But, sometimes biological factors play a role producing an unpredictable outcomes. However, the patient is entitle to receive financial compensation if the patient is able to prove the harm or loss which resulted due to the commitment or inability to performance the reasonable standard of medical care by the medical professional. The rational of awarding damages by a civil court is to resuscitate the financial loss suffered as a result of breach of medical professionals. Even in Sri Lanka at civil courts (district courts) award compensation for physical and rarely mental damages cause by breach of owed care by medical practitioner. The critical question that courts ask that should be affirmative to be guilty of the medical professionals is whether the respondent doctor would have done or omitted to do as an average doctor of the same seniority and experience in identical circumstances in relation to the condition of the patient and the place in which the examination and the treatment was conducted. Sometimes there are crystal clear situations "the factor speak for themselves" (res ipsa loquitor) and that situation shifts responsibility of burden to prove to medical practitioner. In some situations the civil courts has to adopt the procedure to find out from peers about opinion regarding medical issues. The fact of the case are placed for clarification before the experts whether that act is accordance with the reputable and acceptable medical practice. In many countries there are medical protection societies which will offer insurance cover against alleged breach of owed duty of medicine by the professionals. So, in this tort system under civil cases even a serious harmed patient does not able to get any certain compensation if the matter failed. General sense that the legal process is very slow and take several years including expenses. Therefore only a few people will bear the time and money consumption at the medical negligence litigation. To overcome the unfairness in the civil litigation most of countries like New Zealand, Finland, Sweden and Norway introduced no-fault

system to their patients of victims who seek compensations for breach of a medical negligence. This system is test not the medical practitioner's negligence but the patient centered safety. Usually, this system is funded from the employers, employees and state to pay the patients who select the no-fault system. Actually no fault system is like a strict liability that does not need the proof of damage caused. The only thing the patient has to prove that medical profession was in breach of the owed duty to care that is to receive compensation for the damages. As there are two side in one coin the only disadvantage of the no fault system is, this system able to pay a small quantum only. No fault system is a method that is for 'all or nothing'. Accordingly, the burden of proof has to achieve at least fifty one percentage in order to win the claim . On the other hand if the result is forty nine percentage then the patient has nothing. Patient losses everything available in the case matter. So, this bring frustration to the severely damaged patient, if the patient does not file a tort suit at civil courts against the medical practitioner who breach the owed duty of care within his authorised profession. Litigations are extremely expensive and take more time. Usually rich people and poor's who gain legal aid can fight for this. Another sad situation is its extremely difficult to get medical opinion in favour of patient who suffers the breach of medical negligence. All most all of specialists would not like to give their opinion against their colleagues in professions as expert opinions or secondary opinion delivery.

4) Sri Lankan judges' view on quality of standard

Quality of standard of medical practice is always look through the evidence of competent medical practitioners in the regarding field. So, the most relevant and only reported case in Sri Lanka is none other than the Arsecularatne vs Soya. During 1994 at the District Court of Colombo called for a neurologist, neurosurgeon and two Professors of Pediatrics in order to secondary medical evidence. According to the case facts defendant, Professor Priyani Soysa consultant who took the consultation and undertake the admission of baby Suhani Arsecularatne to the Nawaloka privte hospital. Treatment went about a month but no signs of recovery or healing other than deterioration of her condition. Eventually, little baby died. According to the trial judge, the Paediactric Professor Priyani Soysa misdiagnosis which could have been prevented if respondent, Paediactric had shown more care and attention to her patient. The respondent was found guilty of medical negligence for failure to diagnose a brain stem glioma (brain tumour). Medical practitioner diagnosed as rheumatic chorea. At the Appeal Court judges found the medical practitioner negligent on the grounds of failure to take proper history of the patient. Also failed to record the history took and prescribed simple investigation called CT scan to the baby patient. According to the trial it was pointed out that diagnose of rheumatic chorea had made without recording and considering inconsistence symptoms with such diagnosis. The surprise is that it is possible that doctors do not record the clinical observation but in reality it pointed out that lapses get highlighted. In the court there need every reasonable evidence that medical practitioner had done everything to come to the reasonable decision according to the circumstance. The court can come to a conclusion at the time if the bed head ticket of the baby Suhani had a reasonable notes. Generally the medical practitioner records important positive and negative features of the patient and not all things in the bed head ticket. However, Court of Appeal declared that "a doctor who considers too important not to condescend to write history on a bed head ticket or make referral notes herself cannot be expected to have treated the child or parents with care and respect, nor given herself sufficient time to investigate and reconsider her initial diagnosis of rheumatic chorea''. The trial judge's view was that "Negligence, if admitted in law, is a feature of the present and past. A doctor is expect to treat the child to the best of the practitioner's ability, irrespective of what is take place in the future. An extended peep into the future with the knowledge of medical science as it exist in the present, cannot be used as a weapon to sward off the evil effects of our present or past action." If this happened today, court might seek expert assistant under Recovery of damages for death of a person Act, No.2 of 2019 to determine parents on the death, loss of the love affection, care and companionship.

5) Duty of medical practitioner and rights of patients

Generally, The Americans are used to practice patient oriented standard. According to Canterbury v Spance the patient has the right of inform and medical professionals are under a duty to disclose all the information. But, the final selection is with the patient. The British are attracted by medical professional oriented method. According to the Sideway doctor has the selection of what to disclose and not, to the patient. As a medical practitioner should always be aware of recent developments as a

common knowledge including the knowledge of accepted methods in history taking, clinical examinations, investigations, diagnosis, treatments, prophylaxis, therapies and care after treatments. There are some situations that junior working for long hours and tiredness or untrained can leads to loose skill and making judgements. So, there can be situations these fatigue or lack of knowledge neglect the necessary step or doing incorrect procedure and lead to a breach of their owed duty as medical practitioner and liable to medical negligence compensation awards. In practical there were some incidents that untrained blood bank medical officer's incompatible blood group cause the death of a patient. Also, doctors, nurses, pharmacists and other relevant medical professionals should consider the warnings, circulars, quality failures, side effects send through health services and regulatory committees regarding drugs. No excuses for being in a rural area or village. Reading a recognised journal like Ceylon Medical journal, British Medical journal and Lancet is very helpful to gain the new knowledge. As a practice medical professionals enter all information in bed head ticket from the arrival for diagnosis, clinical findings, and investigations until consequences follow ups even after discharge. But most of the busy senior doctors in Sri Lanka used to write minimum or ask their juniors to write in detail in the bed head ticket.

The duty to inform complete information to the patients about the risk of a proposed treatment while giving details benefits of the treatments. The patient is entitle to know what is done even when the patient is not in a position to assess like anaesthetized. Even though the medical professions are not need to admit negligence but patients have a right to know everything to the fullest disclosure of what was committed and omitted even at things went wrong. When competent medical professionals brave enough to follow a procedure for the first time which is not yet approved through clinical trials or science has not yet currently use to save lives does not considered as accepted practice of medicine. So, in these circumstances patient has a right to well inform of the procedure of experiment. On the other hand when new technology goes better than the old methods, the old fashion has to tail off and act as minority practice. So, the patient has the right to ask for new accepted technology in their procedure of medical care. Another interesting fact is that other countries, including Sri Lanka proving a medical negligence against a medical professionals is a strange subject matter. As average people cannot compel doctors or other medical professionals to ask for medical records of his or relatives. Even the law has not yet consider this area much. But the patient has a right to ask a copy of his or her medical record even for a nominal price if it is a property of medical professionals and hospital. According to section 33to 35 of the Supreme Court Act 1981 of England provide authority for High Court to order, to have possession and disclose all documents before filing a case.

According to common law authority in McCormank v Redpath Brown and Company and another complain made on medical negligence liability of doctor and the hospital. But, the final declaration was that hospital was ordered to pay damages considering as that young and careful doctor had done his best to the circumstance even though he was having lack of sleep and tired working for thirty hours. This a good example that suit for Sri Lankan consideration with under staff status and lack of facilities in unprivileged government and private hospitals. But sadly, Sri Lankans used to follow English or other jurisdictional cases blindly been expecting to perform beyond available resources without thinking the real condition and standard of care in those countries.

6) Criminal medical liability

Beyond reasonable doubt is the burden of prove that expect in criminal offences. In criminal medical negligence litigation required the type of degree should amount to criminal offence. In civil medical negligence the patient who suffers can made a complaint against the medical professional with the intention of pecuniary compensation is the most famous type in most jurisdictions. But in criminal medical negligence charges bring punishments as punitive compensation award to the alleged medical negligence of medical profession. The mens rea that amount to deliberate wicked, reckless, rash and had scant disregard for the life and the safety of their patient. Generally criminal medical negligence is here before the magistrate court or the high court in litigation. Sometime this kind of criminal wrong can be consider much more serious than a negligence at judgments. As there is no malice or pre mediation to destroy the life of the patient and direct action situation is different from murder. But the sever carelessness or lack of fore thought can consider as culpable homicide not amounting to murder according to Sri Lankan Penal Code and manslaughter in the United Kingdom. According to

section328 of Sri Lankan Penal Code a medical professional can be held liable for criminal negligent act of rashness causing patient hurt. The punishment is maximum six month imprisonment and a fine. Section 389 is for grievous hurt cause by the negligent act with the award of two year imprisonment and a fine. Finally, if death caused by the negligent act can give five year sentenced of imprisonment and a fine. Actually in practical here have been very limited number of criminal medical negligence charge for the breach of owed duty by the medical practitioners in all over the world jurisdiction including Sri Lanka. Most probably the reason is state who has the power reluctant to prosecute the noble people in medical profession. But, someday the state will prosecute the medical professionals for their breach of owed duty for the commitment of negligence like damage cause due to the influence of drugs or alcohol or cause a negligence during a trade union action fails to attend on emergency service. Even though civil responsibility have immunity for trade unions but criminal commitment looks in different spectacle considering best interest of the patient at the circumstance with informed consent and lack of adequate resourses in developing countries.

B Discussion of the results of the analysis

1) Medical professional insurance

Typical insurance policy respond for bodily harm, property damage or other forms of insurance cover employers, product liability and any other general circumstances only. But medical professionals can give rise to legal claims under the name of medical negligence. But without any specific clause in those general policies in insurances reluctant to perform. Under professional liability insurance the special policies like error, omission or negligence act committed in the insured's medical professional duty based on circumstances are obliged to cover claims made during the policy period. Majority of American doctors, dentists, psychologists, pharmacists, optometrists, nurses and physical therapists require to consider this type of medical insurance for their professional career. Depend upon the location and nature of medical practice insurance differs. Sometimes federal (USA) government made the insurance against medical negligence liability to protect the medical employees. Generally medical professional insurance coverage seek to protect medical professional and the business surrounding too. All the expenses in medical negligence litigation including attorneys' fees, court costs, arbitration costs, settlement costs, compensation, and medical damages usually consider under indemnity covering. Medical professional insurances does not cover criminal acts, sexual misconducts and misbehaviours. Enhance patient safety and non-judicial compensation by replacing tort liability is always intended as USA, being patient oriented country.

2) No fault system

No fault system is a new successful era introduce at the failure of civil and criminal medical negligence like practice in Sweden, Finland, Norway and New Zealand. It is not seeking for the doctor's negligence at breach of owed duty but always wish to pay attention for the patients need. Even though no-fault is a supplement with advantages there are few regrets in this system too. The main disadvantage is difficulty in identifying qualified subjective area for compensation. No fault system is unfair for the patients who suffer a serious medical negligence as the compensation award is minimal and hardly pay a large number of monetary amount. As funding comes from government, local council and physician. The basics steps to no fault system is so flexible. The victim patient makes an application in order to get compensation for medical negligence (malpractice). Then at the time notification made by the expert panel to the physician, has to give a written report about damages and procedures. Next, during the primary investigation has to determine the eligibility of the application and medical report. If the patient supposed not to appear before court the panel have to interview the physician. Panel also can call for witness when necessary. No fault system does not intend to replace court system. Within six months medical negligence compensation for breach of owed duty will awarded.

3) Consumer Protection Act

Magna Carta is the first charter which took the attention of consumer. 1986, Act of Consumer Protection in India replace by new Bill of 2019 with the intention of protecting consumer within the wide spread of business network. The consumer disputes Redressal forums are the statutory established courts specially to hear the consumer litigations. Section 7 of 2019 (S.2d of old Act) identify a person who avails a service for a consideration knows as a consumer. Whereas the deficiency of service which lead to an injury to consumer by any act of negligence or omission or commission defines under section 11

of new Act (S.2g of old Act). Multiplier is a successful compensation calculating method. During 90s Mrs. Auradha Saha visited her hometown Kolkata, India. On their journey she died due to an overdose of a wrong drug prescription by a negligent doctor for treating her skin allergy. Her husband doctor Kunal Saha initiated the legal battel against the negligent act of medical professional that led to the death caused by breach of an owed duty. Mr. Kunal Saha have relentlessly fight for fifteen years in order to establish the justice for innocent patients like her wife. On August, 7th, 2009 the Honest Supreme Court of India held four Kalkata based doctors and AMRI Hospital of Kalkata guilty for death in a historic judgement. The highest consumer court of Indian National Consumer Disputes Redressal Commission (NCDRC) made the award for late Anuradha. This was the highest compensation awarded in India up until date. Awarded compensation of 1.7 crore of Indian Rupees on October 21st, 2011. Indian society are more proactive and lot of organisations and societies have raised like 'People for Better Treatment ' in order to bring a safety towards the victims of medical negligence. However, the provisions of Indian consumer protection Act usually working with the government health institutions excluding where all services are deliver free of charge. Act of consumer is also reluctant to apply with free of charge services. There are lot of people even in Sri Lanka keep severly suffering every day due to some kind of breach of medical negligent owed by a medical professional. Sarla Verma and Nizam institution cases are some successful compensation awarded cases. Susamma, Trilok Chandra and Charlies are best examples where the development of law looked forward to consider consumer protection with colloborating no fault compensation method.

Sri Lankan legislature introduced 2003 a new Act, the Consumer Affairs Authority No.9 with the hope of alleviating the weaknesses and limitations with the prevailing legislates by replacing the Consumer protection Act 1979. As stated in the preamble aims by way to provide for the better protection of consumers through the regulation of trade and services against unfair practices. Same wordings are reiterated in Consumer Protection Act of India and Sri Lankan Consumer Affairs Authority No.9 of 2003. As example section 75 of Sri Lankan Consumer Affairs Authority Act 2003 define consumer and services as same as Indian Consumer Protection Act section 7 and 11. Specially, the definition of consumer and services are well matched. So, it is a green light to get use of consumer protection at medical negligence litigations as from Indian statutes and common law.

IV. CONCLUSION AND RECOMMENDATIONS

Among the above discussed compensation methods for medical negligence, Sri Lanka can adopt selected comparative methods to enhance patient safety a replacement for civil (tort) liability. Medical professional insurance method can be a good indemnity to protect consumer (patient). Government funded (full or half) for government hospital medical staffs or individual funded (medical professional) insurance against medical negligence only arising for the provision. Government can make this as a mandatory policy as in some states in USA. No fault compensation system and consumer protection Acts are usually appreciated by non-judicial compensation. While no-fault system does not need any evidence of damage cause by the medical negligence while consumer protection act has to go through with statutory provisions to define consumer, services and deficiencies to win the case. In no fault system medical professionals come forward with their patients to improve the whole network in medical system. As no fault system is a flexible compensation award for settlement claims within six months. In consumer protection Act being a consumer has more rights than a layman. Even though no-fault system has been well operating over twenty five years in top ranked humanitarian develop countries, the final award is a small quantum of compensation and it is a 'all or nothing' method that sometimes frustrate the patient (consumer). The patient who consider as a consumer has more rights with medical negligence compensation than before. However, professional medical insurance, no fault system and Consumer Protection Act will be better helpers to fill the gap when comparing other jurisdictional methods for medical negligence compensation. The people of Sri Lanka have to be more vigilant and enthusiastic on judicial activism on medical negligence compensation. There are lot of 'Suhani Arsecularatnes', Auradha Sahas been dying every day asking to enhance consumer (patient) safety with assured compensation for medical negligence breach. However, the best story about medical professionals and medical negligence litigation compensation revealed in Hatcher v Black as professional reputation is as dear to professionals as his body. But an action for negligence can wound his reputation.

Recommend to analyse merits of prevailing medical compensation law and evaluate the protection available to patient as a consumer through medical professional indemnity insured without any evidence of damages.

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AUTHOR BIOGRAPHY

The author Nadeesha Chandrasiri is a master student in the Centre for Human Rights and Democratization, Faculty of Law of Colombo of University, Sri Lanka. She has completed her LL.B (Hons.) from University of London, and obtained a LL.M from University of West London with a Merit and distinction for her dissertation. Her research interests include Law of Delicts, Human Rights Law and Consumer Protection Law.

Legal Spotlight for Resilience of COVID-19: Public Nuisance in Workplaces

AP Vithanage

Attorney-at-Law, Supreme Court of Sri Lanka

asnipreejavi@gmail.com

Abstract - The COVID-19 pandemic has already created reflective dreadful effects in each country diversely. Governments have taken strict measures to lessen the shocking consequences of the outbreak and with the intention of combating the deadly virus. Accordingly, litigations which relate with workplaces not complying with COVID-19 health guidelines have been increased as exposure of employees as well as their family members to the virus may fence in employers liable for their infection. The modern notion of the public nuisance cause of action is addressed in these lawsuits, and it has become a trend. Hence, this research follows a doctrinal methodology, which intends to study whether and to what extent new-fangled appearance of public nuisance is applied in the scenario of COVID-19 pandemic, and it discusses optimistic and pessimistic outcomes of such applications as well as the defences. The article concludes by having positioned the workplace policies and practices implemented and enforced in the prevailing legal framework that meet the recommended health guidelines and various existing defences to the focal theory, which can help to set aside public nuisance claims.

Keywords— COVID-19, public nuisance, workplace

I. INTRODUCTION

SARS-CoV-2 or COVID-19 is a highly contagious disease which normally spreads by way of close contacts with an infected person. Due to its rapid spread and related threats and seriousness of the virus cannot be inconspicuous. Consequently, the crisis has severely punched countries creating a post pandemic catastrophe which continues to cause social, economic, health and environmental damage. People have inspired to seek compensation through more creative, uncommon mechanisms such as public nuisance claims.

In order to contain the virus, severely heightened mitigation efforts have been immediately implemented all over the world accordance with the recommendations taken by World Health Organization. As lockdowns, curfews and restrictions have begun to slacken off, individuals are in proximity and not having complied with physical distancing practices, relevant health and safety standards and recommended precautionary measures, the vulnerability of virus aggravates radically. With these unprecedented circumstances, application of public nuisance claims have continued to expand with varying extents as a cause of action, especially for employment not taking reasonable steps to protect employees. Thus, these lawsuits are creating a severe threat while businesses try to find a way of the "new normal."

Therefore, this paper intends to scrutinize the application of public nuisance in order to grant relief to the actual victimized employees who allege that they were exposed to COVID-19 because of the risk created by the employers. And it is noticeable that as a common law right to recover damages from an employer without concerning the defences, public nuisance law would lose its validity as it has gone off the rails of its underlined purpose with the circumstances of the crisis. This paper concludes with concise final views to strengthen the doctrine of public nuisance which can be used more effectively to protect the rights of employers as well as employees which will contribute to constitute a more rewarding legal framework in response to the epidemiologic impact.

II. METHODOLOGY

This doctrinal research based on primary and secondary authorities including existing laws, related cases, books, journal articles and online sources and comprised a deep analysis of the developing legal proposition of public nuisance

theory in the arena of workplace occurrence due to COVID-19. And the main purpose of this theoretical research is, approach the broader objectives of law having applied traditional theories in modern circumstance shaped by the pandemic.

III. DISCUSSION AND ANALYSIS

A. Public Nuisance

The Nuisance is originated from the French word '*Nuire*' which denotes to annoy or hurt and it is a common law tort action which relates to the use and enjoyment of land. It is "*sic utera tuo ut alienum non laedas*" which means "a man must not make use of his property unreasonably and unnecessarily to cause inconvenience to his neighbours".

Typically, a nuisance is a wrongful conduct or omission which has been illegally and unreasonably done to a person by another disturbing his previous enjoyment of a property or a common right. The law of nuisance tries to strike a balance between the competing interests of the land owner on the one hand and other who may be adversely affected by his action or omission on the other hand.

According to John Salmond "*The wrong of Nuisance consists in causing or allowing without lawful justification the escape of any deleterious thing from his land or from elsewhere into land in possession of the plaintiff, i.e. water, fumes, smoke, gas, noise, heat, vibration, electricity, disease, germs, animals*"[1]

There are two types of nuisance in English Law respectively Public Nuisance and Private Nuisance. Other than to those, Statutory Nuisance also existing as said by Wolf and White who summarize the three categories of nuisance as follows;

"*The tort of private nuisance attempts to reconcile the competing interest of landowners; public nuisance is a crime which protects public rights, although an individual may bring an action where he or she suffered damage over and above that suffered by the public generally; a statutory nuisance is one which is largely controlled by local authorities exercising their statutory powers*"[2]

The common idea of public nuisance is an unreasonable use by a person of his or her own property that works to injure the rights of the public.[3] Eventually, the theory has become a more wide-spectrum cause of action used to protect rights common to the public, including environmental pollution, uncontrollable conduct and public health.

Effectively, there are generally four basic elements to claims of public nuisance: the existence of a public right, a substantial and unreasonable interference with that right, proximate cause, and injury. But these elements are less well-defined than in other causes of action, which is part of the appeal for plaintiffs[4]

To constitute "public nuisance," an interference with a right common to the public should be sustained including public health, the public peace, the public safety, the public convenience or the public comfort or a right enshrined by a stipulated law. And this interference must be substantial and unreasonable.

In Sri Lanka, Section 98 of Chapter IX of the Code of Criminal Procedure Act has specified the public nuisance and Chapter XIV of the Penal Code of Sri Lanka, section 261, a definition to the theory can be found and it states "*a person is guilty of a public nuisance who does any act or is guilty of any legal omission, which causes any common injury danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury obstruction danger or annoyance to persons who may have occasioned to use any public right. A public nuisance is not excused on the ground that it causes some convenience or advantage.*" Chapter IX of the Code of Criminal Procedure Act No. 15 of 1979 cope with judicial orders pertaining to removal or abatement in such cases and Magistrate has the power to issue a conditional order or an order of Injunction.

B. Public Nuisance shaped by Covid-19

As each country is seeking better measures which can mitigate the epidemiological impact adopting necessary precautionary measures and follow the recommended health guidelines implemented in the

[1] Salmond J. (1973). *Salmond on Torts*. 16th ed. Sweet and Maxwell, London, p. 52
[2] Wolf S. and White A. *Principles of Environmental Law*. p.82
[3] H. Wood. (1893). *A Practical Treatise on the Law of Nuisances* section 1. 3d ed. pp.1–3
[4] COVID-19: The Next Public Nuisance? [online] Available at: <https://www.jdsupra.com/legalnews/covid-19-the-next-public-nuisance-83133/> [Accessed 10 Jun. 2021].

domestic legal system having collaborated with international law are obvious. It is the emerging trend of applying public nuisance based on forming unreasonable risk of the virus to the public or those who often getting contacted specifically in which the employer's failure to obey with COVID-19 safety guidelines.

As aforementioned, an unreasonable interference with a right common to the general public should be proved so as to constitute public nuisance and in the context of COVID-19, public health imperative to combat the spread of an infectious, dangerous disease is enough to meet the terms to the public right requirement. This has opened new arena of public nuisance particularly against employers that allegedly fail to comply public health guidelines.

This emerging movement is vastly applying in United State of America in the phenomenon of the pandemic. Under the California Civil Code, section 3479 "nuisance" is "anything which is injurious to health, … or is indecent or offensive to the senses, … so as to interfere with the comfortable enjoyment of life or property." and section 3480 defines "public nuisance" as any nuisance that "affects at the same time an entire community or neighbourhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

Therefore, the court granted preliminary and permanent injunctive relief enjoining Defendant from continuing to engage in, and from refraining from engaging in, the wrongful acts, omissions, and practices alleged herein whose commission and omission constitute a public nuisance, unfair business practice, and/or violation of law.[5]

For instance, a case decided in 2020 by the United States District Court, Eastern District of California, *Maria Pilar Ornelas v. Central Valley Meat Co., Inc.* 1:20-cv-01017-AWI-SKO, is a landmark suit where court decided the defendant's acts and omission substantially and unreasonably created the risk of spread and transmission of COVID-19 all of which form a public nuisance. In this case the plaintiff sued against her employer claiming several infringements of California state law, Family and Medical Leave Act and California Family Rights Act, as employer is a meat packing plant and was unable to comply with minimum health and safety standards and adopt recommended precautions in order to combat COVID-19 virus and avoid its spreading and consequently employees became very sick and fearful of their health and safety. Plaintiff supported her public nuisance claim by showing the ultimate result by the failure of the defendant to defend its employees from the virus and number of COVID-19 cases could have been increased in the community in so doing. The defendant allegedly;[6]

(a) intentionally failing to timely notify employees of their exposure to COVID-19;
(b) refusing to send home employees with COVID-19 symptoms;
(c) pressuring employees who call in sick with COVID-19 symptoms to report to work with threats of termination for job abandonment;
(d) instituting a No-Fault Attendance Policy that pressures employees to work even when they are sick, out of fear of earning points toward discipline;
(e) instituting a Bonus Appreciation Policy and Inventive Pay Policy for workers to lose incentive pay and/or bonuses for missing any work, even if it's because they are sick or disabled because of COVID-19;
(f) with the fast-paced production line, disenabling employees from taking adequate breaks to wash their hands or otherwise allow for heightened cleaning and disinfecting of the workstations;
(g) refusing to implement adequate engineering controls to prevent the spread of SARS-CoV-2 (e.g., forcing employees to work in close proximity without adequate masks, gloves, or facial shields and without sufficient or effective sanitization); and
(h) allowing and pressuring workers exposed to SARS-CoV-2 and who test positive for COVID-19 to return to work without proper quarantining, screening, monitoring, and/or other protective measures.

Palmer .v Amazon.com, Inc., 2020 WL 6388599 (E.D.N.Y. 2020); appears to be another example where public nuisance complaint was filed against Amazon in New York, accusing the company of failing to protect them from Covid-19 by not put into effect proper hygiene or social distancing.

[5] *Maria Pilar Ornelas* v. *Central Valley Meat Co.*, *Inc.* 1:20-cv-01017-AWI-SKO. p.56

[6] Ibid 5. p.21

In India Section 268 of Indian Penal Code, 1872 defines Public nuisance[7] and Under Section 291 of the IPC, this kind of nuisance is punishable with six months imprisonment, a fine or both. One of the most fundamental segments of containment of public nuisance is the quarantine provision of Indian Penal Code. Its Section 188, 269, 270, and 271 and Section 133 of Criminal Procedure Code, assumes pivotal significance in the present scenario of the COVID-19 pandemic and lock-down orders.[8]

In milieu of Sri Lanka, Five residents of Palamunai have filed a public nuisance case at the Akkaraipattu Magistrate's Court against the Palamunai Divisional Hospital being used to treat Covid patients and claimed that their groundwater is contaminated by waste water from the hospital that carries body secretions and excretions including stools of the Covid patients which has led to public nuisance[9] and this case can be shown as a gateway towards the public nuisance case which guise the Covid-19.

C. Defences to Public Nuisance Claims in the phenomenon of Covid-19

While some courts are giving wider interpretation to this doctrine, some courts and defendants have avoided from it by having put forward the defences. As the novel outer shell of public nuisance has come into sight from United States of America, defences also can be found from that jurisdiction.

It is essential to rely on all applicable laws, bylaws, regulations and orders pertaining to COVID-19 public health guidance when defending public nuisance claims. When safety measures taken by employer are in line with a piece of legislation cope with the situation, employer can have a safe from such claims. Exclusive Remedy Rule also can be elucidated in this manner where limited benefits include in workers' compensation statutes such as by employees only to recover for work-related injuries. The court have carved out wider-interpretation and exceptions to the exclusive remedy rule such as dual capacity doctrine and these exceptions allow employees to recover more from employers than merely the statutorily prescribed benefits.[10]

Primary-Jurisdiction Doctrine is significantly applying discretionary doctrinal defence in the countries like United States of America that court may invoke to stay or dismiss a party's claims.[11] This judge-made doctrine allows a judge to transfer an entire claim or individual issues of a claim to an administrative agency for resolution and Courts use this to balance the relationship between courts and administrative agencies when their jurisdictions overlap.[12] In *Palmer .v Amazon.com, Inc.*, 2020 WL 6388599 (E.D.N.Y. 2020) judge Brian M. Cogan granted Amazon's motion to dismiss the public-nuisance claim under the primary-jurisdiction doctrine. In *Hernandez v. VES McDonald's* (No.

[7] Section 268, Indian Penal Code, 1872: Public nuisance: A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

[8] Jonahshiny. *Covid-19: The Current Legal Challenges And Important Strategies Of World Health Organization Globall*. [Online] Available at <http://www.legalserviceindia.com/legal/article-2189-covid-19-the-current-legal-challenges-and-important-strategies-of-world-health-organization-globall.html> [Accessed 10 Jun. 2021].

[9] *Public nuisance case filed against Covid treatment facility in Palamunai over groundwater contamination*. [Online] Available at <https://www.newswire.lk/2020/12/21/public-nuisance-case-filed-against-covid-treatment-facility-in-palamunai-over-groundwater-contamination/>[Accessed 11 Jun. 2021].

[10] *Exclusive Remedy Rule Law and Legal Definition*. [Online] Available at <https://definitions.uslegal.com/e/exclusive-remedy-rule/> [Accessed 09 Jun. 2021].

[11] Gary P. Gengel, Kegan A. Brown, and Robert J. Denicola. *Use of the Primary Jurisdiction Doctrine to Defend Litigation Involving Contaminated Sites*.[Online] Available at <https://www.lw.com/thoughtLeadership/use-of-the-primary-jurisdiction-doctrine-to-defend-litigation-involving-contaminated-sites> [Accessed 11 Jun. 2021]. "There is no "fixed formula" governing application of the doctrine, in general, the factors that courts evaluate include (1) whether the issue is a question within an agency's particular field of expertise, (2) whether the issue is particularly within the agency's discretion, (3) whether there is a substantial risk of inconsistent rulings, and (4) whether a prior application to the appropriate agency has been made..."

[12] Penney M. *Application of the Primary Jurisdiction Doctrine to Clean Air Act Citizen Suits*. [Online] Available at <https://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bcealr/29_2/06_TXT.htm>[Accessed 14 Jun. 2021].

RG20064825, Superior Court of California, County of Alameda) McDonald was sued on the failure of providing sufficient safety training or protective equipment to employees. The family members of employees also alleged that they were exposed to the virus when infected employees came home. The Cook County court denied McDonald's motion to dismiss on the grounds that regulatory agencies have primary jurisdiction, allowing the public nuisance claims to proceed.

Implementing reasonable safety measures and enforcing compliant workplace policies and practices is another potential defence. *In Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, No. 5:20-CV-06063-DGK, 2020 public nuisance claim was dismissed as the employer Smithfield has taken momentous precautionary measures to cope with preventing further infection.

Although Control over the nuisance as a strong defence, is generally used where manufacturers argued that they were not in control of the alleged nuisance at the time it caused harm, it is used differently in the pandemic related cases having developed that the defendants do have control over the premises, but do not have control over the virus or potentially over the actions of employees.[13]

Causation is another practicable defence as the requirement of proximate cause or the affiliation between cause and effect is mandatory to such suits. It is hard to prevail a public nuisance action by having proved that one person has suffered special loss.

D. Advantages and Disadvantages

It is essential to follow the recommended health guidelines in order to combat to the outbreak and applying this theory to the current cohesion has clear potential to ensure worker safety and created a legal inspiration for the mindful employers to carry on such public health measures and a employee successfully proves to a court that employer has or will cause them harm, that person can be ordered to pay damages to compensate for the harm suffered and/or prevent causing the harm as a precautionary measure.

On the other hand, such restraining order compelling the business to be shutdown could be destructive to a business and this process may weird by having filed unnecessary mere cases with a hidden purpose of an employee and where employees have attempted to use public nuisance law to evade the requirements of other causes of action. This can be lighten through the defences pertaining to the doctrine and it will discourage alleging such claims as it is unclear whether courts will allow the claims or plaintiffs must seek recourse another way.

IV. CONCLUSION

In sum, COVID-19 pandemic possibly will imply that these cases are novel, but they really like a new-fangled outer shell of the public nuisance and the covid-19 suits are therefore the most recent manifestation of a larger trend of guise of public nuisance.

Seeing that the challenges of the deadly virus has created and will continue to twist for employers in future as well, public nuisance is going to be an imperative as it can be expected more will be alleged similar pattern in this context. Consequently, public nuisance claims based upon an employer's supposed failure to heed public health orders may soon find itself in more employment cases also in Sri Lanka in the continuing nature of the pandemic.

Although the defences have carved confusion how certain courts will ultimately rule on the issue and where courts have barred such suits, adhering to the health measures will be an important defence and in response to defending a public nuisance action is to differentiate the genuine cause of action the employee should have brought from public nuisance, both in terms of the elements and the purpose of each.

These public nuisance claims are challenging but paramount and prospectively a perfect fit for the new normal as such actions advancing the interests of large numbers of citizens in the pandemic context by adopting reasonable measures which devastated workplace exposure to Covid-19 can be used as a legal tool to fill the gap between law and challenges posed by the crisis.

[13] Cialkowski A; Nilan M.; Reichard C; Salveson E; Sylvester C; and Lewis P.A. *COVID-19: The Next Public Nuisance?*. [Online] Available at <https://www.jdsupra.com/legalnews/covid-19-the-next-public-nuisance-83133/> [Accessed 12 Jun. 2021].

Conversely, public nuisance claims are an additional risk which could create profound consequences for employers as well as employees and success of such claims depends on how courts choose to extend public nuisance doctrine to the workplace to achieve the ultimate purpose of the doctrine. To manage the risk, a progressive and effective legal mechanism inevitably based on judicial intervention in advance of legislative authority is still needed which forces business is to take reasonable measures to protect employees and the public during the COVID-19 outbreak and in order to make the balance between the competing interests of the employers and employees.

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AUTHOR BIOGRAPHY

Author, Ms Asni Preejavi Vithanage is an Attorney-at-Law and a Visiting Lecturer in Law at the Open University, Sri Lanka. She holds an LL.B from the Faculty of Law, University of Colombo with Second Class Honours (Upper Division) with P. D. H. Karunatileka Memorial Prize for the Best Performance on the results of the Bachelor of Laws Examination, Year 111 and Justice Mark Fernando Prize for the best performance in Administrative Law and passed final examination of Law College with a First Class Honours. She is also qualified as a Notary Public, Commissioner for Oaths and a Company Secretary. Her primary research areas are private Law, Public International Law and Human Rights Law.

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